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## VOTING IN THE SECURITY COUNCIL: ABSTENTION FROM VOTING AND ABSENCE FROM MEETINGS

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THE action of the Security Council in the Korean affair, instituted by the note of the United States of June 25, 1950,<sup>1</sup> stirred up interest in some of the unresolved questions concerning the interpretation of Article 27 of the Charter. The questions to be considered are those arising from the abstention of a permanent member from voting on a matter of substance and those arising from the absence of a permanent member from a meeting of the Security Council in the course of which matters of substance, and more particularly matters falling under Chapter VII, are submitted to vote.

### I. ABSTENTION FROM VOTING

The second part of Article 27, paragraph 3 makes abstention from voting mandatory in case a member, whether permanent or elected, is a party to the dispute. This provision is clear and need not be further discussed here. It is also unnecessary in this context to go into the question of whether this mandatory rule includes the duty to abstain on preliminary decisions such as whether a matter is a dispute or a situation, whether the dispute is of a certain gravity as indicated in Articles 33 and 34, and whether a state is party to a dispute.

Before going further it may be useful to recall the text of the first part of paragraph 3 of Article 27: "Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members." This text has sometimes been said not to require the concurring vote of all the permanent members other than those bound by the mandatory rule in the second part of paragraph 3 of Article 27. Interpretation of the requirement, however, need give rise to no serious differences of opinion in view of the legislative history of Article 27 and the insistence both before and after the San Francisco Conference on the principle of unanimity of the permanent members of the Security

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1. Document A/1495. Department of State, *United States Policy in the Korean Crisis*, Publication 3922 (1950), p. 11.

Council.<sup>2</sup> Any remaining doubt might be set at rest by reference to the equally authentic French text of that paragraph which speaks of "un vote affirmatif de sept de ses membres dans lequel sont comprises les voix de tous les membres permanents", the equally authentic Spanish text which speaks of "el voto afirmativo de siete miembros, incluso los votos afirmativos de todos los miembros permanentes", the equally authentic Russian text which uses the word "bcex" meaning "all," and finally the Chinese text which uses the word "ch'uan t'i" meaning "all." There is scarcely any room for doubt, therefore, that in matters other than those falling under Article 27, paragraph 2 and under the mandatory rule of abstention under the second part of paragraph 3 of Article 27, the affirmative vote of all the five permanent members is required in addition to the affirmative vote of two elected members.<sup>3</sup>

In practice, the Security Council has adopted a somewhat different view of the voting requirements which should govern its action. Beginning with the resolution of April 29, 1946 concerning the establishment of a sub-committee to examine certain aspects of the Spanish question,<sup>4</sup> permanent members of the Security Council abstained from voting on what appeared to be matters of substance. In such cases the resolutions, although they did not receive the affirmative vote of all the permanent members of the Council, were considered to be legally valid. The

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2. "In the consultations among delegations of the sponsoring Governments and France at San Francisco a strict view was taken of this requirement, and the agreement reached among these delegations was that the concurrence of the five permanent members should take the form of affirmative votes of all of them in favor of the decision. This agreement was not, however, put down in writing, nor was it ever communicated to the other delegations at San Francisco." Yuen-li Liang, *The Settlement of Disputes in the Security Council: The Yalta Voting Formula*, 24 BRITISH YEAR BOOK OF INTERNATIONAL LAW 358 (1947).

3. See, however, HANS Kelsen, *THE LAW OF THE UNITED NATIONS* 240 (1950). Kelsen suggests that Article 27, paragraph 3 allows two different interpretations. According to one, no valid decision can be taken on non-procedural matters if one of the permanent members is absent from the meeting or abstains from voting: "A permanent member may exercise his veto by being absent or by abstaining from voting." This interpretation, he believes to be supported also by the Statement of the Four Sponsoring Powers. According to the other interpretation, absence of or abstention by a permanent member does not prevent valid decisions on non-procedural matters since Article 27, paragraph 3, only requires "the concurring votes of the permanent members" and does not require the concurring vote of "all" the permanent members, whereas Articles 108 and 109 require ratification by all the permanent members of the Security Council. The second interpretation, in his view, prevails in the Security Council. This interpretation, based as it is on discrepancies in the wording of different articles of the Charter, is not supported by the wording of Article 27, paragraph 3, in the other equally authentic texts. Cf. also statement by Mr. Edward R. Stettinius before the Senate Committee on Foreign Relations: "A majority of seven members which includes all five of the permanent members is required in any decision by the Council for dealing with disputes either by peaceful means or by enforcement action, except that a party to a dispute must abstain from voting in the peaceful settlement stage." *The Charter of the United Nations, Hearings before Senate Committee on Foreign Relations*, 79th Cong., 1st Sess. 211 (hereinafter referred to as *Hearings*).

4. See Security Council, *Official Records* (1st year), no. 2, p. 244.

soundness of this practice has been questioned.<sup>5</sup> And it has not always been accepted without reservation. It has not always been clear whether the resolution referred to a matter of substance or of procedure. On the Spanish question, for example, there was some doubt whether the sub-committee was established under Article 29, in which case the vote of any seven members was sufficient, or under Article 34 in which case the affirmative vote of all the permanent members was required.<sup>6</sup>

### 1. *Practice of the Security Council*

In view of the uncertainty frequently surrounding the nature of any resolution put to a vote and in view of the practice adopted in reporting votes in the Official Records of the Security Council, it is difficult to provide the correct number of votes on matters of substance in which one or more permanent members abstained but where the requisite majority of seven votes was present to carry the resolution. Mr. Zaydin (Cuba) in the *Ad Hoc* Political Committee of the General Assembly declared on May 4, 1949, that there had then been "twenty-six resolutions of the Security Council in which one or more of the five permanent members had abstained from voting [which] had been considered legal and valid, and had been adopted without protest or hindrance."<sup>7</sup> He also pointed out<sup>8</sup> that in the majority of cases the abstention had been on the part of the delegation of the Soviet Union. The Department of State has listed ten "of the more important precedents involving action by the Security Council on substantive matters taken without the concurrence of an affirmative vote by the Soviet Union," and three cases in which the Soviet Union "voted with the majority but on which other permanent members of the Council abstained" without questioning the legality of the action taken by the Council.<sup>9</sup>

5. Liang, *supra* note 2, says that "it is not certain that voluntary abstention by one of the permanent members is compatible with the literal language of Article 27, paragraph 3. . . ." See also PAUL HASLICK, *WORKSHOP OF SECURITY* 137 (1948): ". . . the practice of abstention from voting which has been already recognized on several occasions in the Council (although it would appear to be inconsistent with the strict letter of the Charter) could become standard."

6. A participant in the meeting of the Security Council on this question, the representative of Australia, said in retrospect:

"No one had been absolutely sure whether it was appointed under Article 29 or Article 34, but most of us had felt that, to save argument about voting procedures, it might be better to assume that it came under Article 29."

HASLICK, *op. cit.* *supra* note 5, at 104. See also remarks of Mr. van Kleffens (Netherlands) in *Official Records* (1st year), no. 2, p. 244.

7. *Official Records*, 3d session of the General Assembly, part II, *Ad Hoc* Political Committee, p. 207.

8. *Id.* at 209.

9. Department of State, *United States Policy in the Korean Crisis*, Publication 3922 (1950), p. 62.

Although Mr. Zaydin's statement apparently was not based on an official document of the United Nations, it is possible to draw up a list of at least twenty-six resolutions in which one or more of the permanent members abstained from voting and which were considered substantive rather than procedural in character. Taking the annual reports of the Security Council to the General Assembly as a basis and following their topical arrangement these resolutions seem to fall into that category:

A. Period from 17 January 1946 to 15 July 1947

*The Spanish Question*

1. Resolution of April 29, 1946, appointing a sub-committee.<sup>10</sup>  
Abstained: USSR

*The Corfu Channel Question*

2. Resolution of April 9, 1947, recommending reference of dispute to the International Court of Justice.<sup>11</sup>  
Abstained: USSR

*General Regulation and Reduction of Armaments*

3. Resolution of February 13, 1947, providing for the establishment of the Commission for Conventional Armaments and its terms of reference.<sup>12</sup>  
Abstained: USSR

B. Period from 16 July 1947 to 15 July 1948

*The Indonesian Question*

4. Resolution of August 1, 1947, calling upon parties to cease hostilities.<sup>13</sup>  
Abstained: France, the United Kingdom and the USSR abstained on parts of the resolution; the resolution as a whole was not put to a vote.
5. Resolution of August 25, 1947, providing for the establishment of a consular commission.<sup>14</sup>  
Abstained: USSR and the United Kingdom
6. Resolution of August 25, 1947, tendering the good offices of the Council to the parties.<sup>15</sup>  
Abstained: USSR

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10. *Report of the Security Council to the General Assembly*, Document A/93, p. 94.

11. *Id.* Document A/366, p. 108.

12. *Id.* at 131.

13. *Id.* Document A/620, p. 30; Security Council, *Official Records*, 2nd year, no. 68, p. 1700.

14. *Id.* at 33.

15. *Ibid.*

7. Resolution of November 1, 1947, calling upon the parties to consult and interpreting the resolution of August 1, 1947.<sup>16</sup>

Abstained: USSR

8. Resolution of February 28, 1948, noting the signing of the Truce Agreement.<sup>17</sup>

Abstained: USSR

*The India-Pakistan Question*

9. Resolution of January 17, 1948, calling upon parties to refrain from aggravating the situation.<sup>18</sup>

Abstained: USSR

10. Resolution of January 20, 1948, establishing a Commission of Three and laying down terms of reference.<sup>19</sup>

Abstained: USSR

11. Resolution of April 21, 1948, laying down a comprehensive plan for the settlement of the dispute.<sup>20</sup>

Abstained: France and China abstained on some parts of the resolution and the USSR on every part of it.

12. Resolution of June 3, 1948, reaffirming previous resolutions.<sup>21</sup>

Abstained: China and USSR

*The Palestine Question*

13. Resolution of March 5, 1948, calling upon the permanent members of the Council to consult.<sup>22</sup>

Abstained: United Kingdom

14. Resolution of April 17, 1948, calling upon parties to cease all military activities.<sup>23</sup>

Abstained: USSR

15. Resolution of April 23, 1948, establishing a truce commission.<sup>24</sup>

Abstained: USSR

16. Resolution of May 22, 1948, calling upon parties to issue a cease-fire order.<sup>25</sup>

Abstained: USSR

17. Resolution of July 15, 1948, determining that the situation in Palestine constitutes a threat to the peace within the meaning of Article 39 of the Charter and ordering the parties, pursuant to Article 40 of the Charter, to desist from further military action.<sup>26</sup>

Abstained: USSR

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16. *Id.* at 42.

17. *Id.* at 49.

18. *Id.* at 56.

19. *Id.* at 57.

20. *Id.* at 70.

21. *Id.* at 71.

22. *Id.* at 78.

23. *Id.* at 84.

24. *Id.* at 85.

25. *Id.* at 92.

26. *Id.* at 111.

## C. Period from 16 July 1948 to 15 July 1949

*The Indonesian Question*

18. Resolution of July 29, 1948, calling upon parties to observe the "Renville" truce agreement.<sup>27</sup>

Abstained: USSR

19. Resolution of December 24, 1948, calling upon parties to cease hostilities.<sup>28</sup>

Abstained: France and USSR

20. Resolution of December 28, 1948, calling upon the Netherlands Government to set free political prisoners.<sup>29</sup>

Abstained: France and the United Kingdom

21. Resolution of January 28, 1949, calling upon the Netherlands Government to discontinue all military operations and recommending negotiations on the basis of principles laid down in the Resolution.<sup>30</sup>

Abstained: France on all paragraphs of the Resolution and the USSR on some parts of it.

*The Palestine Question*

22. Resolution of November 4, 1948, calling upon parties to withdraw troops and establish permanent truce lines.<sup>31</sup>

Abstained: USSR

23. Resolution of November 16, 1948, calling upon the parties, as a further preliminary measure under Article 40 of the Charter, to seek agreement with a view to establishment of the armistice.<sup>32</sup>

Abstained: USSR

24. Resolution of December 29, 1948, calling upon parties to order an immediate cease-fire.<sup>33</sup>

Abstained: USA and USSR

25. Resolution of March 4, 1949, recommending to the General Assembly the admission of Israel to membership in the United Nations.<sup>34</sup>

Abstained: United Kingdom

*Respective Functions of the Security Council and the Trusteeship Council with regard to Strategic Trust Areas.*

26. Resolution of March 7, 1949, providing for the implementation of Article 83, paragraph 3, of the Charter.<sup>35</sup>

Abstained: USSR

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27. *Id.* Document A/945, p. 2.

28. *Id.* at 8.

29. *Id.* at 11.

30. *Id.* at 22.

31. *Id.* at 46.

32. *Id.* at 49.

33. *Id.* at 50.

34. *Id.* at 89.

35. *Id.* at 91.

No report of the Security Council to the General Assembly is available at this writing for the period from July 16, 1949 to July 15, 1950. It is possible, however, to cull from the official records of the Security Council three resolutions on what appear to be matters of substance adopted between July 16 and December 29, 1949:

27. Resolution of July 27, 1949, recommending to the General Assembly the acceptance of Liechtenstein as a Party to the Statute of the International Court of Justice.<sup>36</sup>

Abstained: USSR

28. Resolution of August 11, 1949, adopting the Franco-Canadian proposals (S/1367) concerning Palestine.<sup>37</sup>

Abstained: USSR

29. Resolution of September 27, 1949, concerning retroactive reimbursement of travelling expenses of alternates on certain commissions.<sup>38</sup>

Abstained: USSR

This list, which includes all of the resolutions enumerated by the Department of State in the White Paper on Korea, makes no pretense at completeness. Any such claim would be hazardous in view of the lack of clarity concerning criteria determining matters of substance or procedure. The resolutions included above provide, however, at least a useful sample of decisions of substance in which one or more of the five permanent members abstained from voting. Several preliminary conclusions may be drawn from this list. First, it may be said that the resolutions cover a fairly wide range of subjects; secondly, that some of the resolutions referred explicitly to Articles 39 and 40 of the Charter, which concern only problems of substance; thirdly, that every one of the five permanent members of the Council has abstained from voting on one or more resolutions, and that in some cases two or more permanent members abstained from voting on parts or on the whole of the same resolution; fourthly, that in some cases members explained their abstention while others reserved their position; and finally, that in at least one case—the admission of Israel—doubt was expressed as to the legality of the vote in the Security Council in which one permanent member, the United Kingdom, abstained from voting.

## 2. *Explanation of Abstention and Reservation*

### a. The Spanish Question

In connection with the vote on the appointment of a sub-committee to deal with the Spanish question, the representative of the USSR, Mr. Gromyko, explained his vote as follows:<sup>39</sup>

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36. Security Council, *Official Records* (4th year), 432d Meeting, no. 35, p. 6.

37. *Id.* no. 38, p. 13.

38. *Id.* no. 44, p. 10.

39. *Id.* (1st year), no. 2, p. 243.

"Bearing in mind, however, that some members of the Council declare that they are still unsatisfied with the information at the disposal of the Council regarding the question raised by the representative of Poland, and bearing in mind, in this connexion, that my voting against the Australian draft resolution would make its adoption impossible, I shall abstain from voting.

"I consider it necessary to draw the attention of the Security Council to the fact that my abstention from voting on this matter may in no way be regarded as a precedent capable of influencing in any way the question of the abstention of permanent members of the Security Council."

While the representative of the Netherlands, Mr. van Kleffens, reserved his position regarding the nature of the matter,<sup>40</sup> Mr. Stettinius, the representative of the United States, declared: <sup>41</sup>

"I wish to reserve the position of the United States of America on the statement the USSR representative has just made. With that understanding, I am prepared to agree that Mr. Gromyko's abstention should not create a precedent for the future."

#### b. The Indonesian Question

The representatives of France and of the United Kingdom abstained on almost all parts of the resolution of August 1, 1947, on the Indonesian Question. The representative of the United Kingdom, Mr. Lawford, after referring to Article 27, paragraph 3, explained his vote saying:<sup>42</sup>

"The United Kingdom has abstained; but in view of the fact that everybody here clearly wishes this war to stop, the United Kingdom does not wish its abstention to be treated as a veto, invalidating the resolution which has otherwise secured the necessary majority."

Following this statement, the President of the Security Council, Mr. F. El-Khoury (Syria) declared: <sup>43</sup>

"I think it is now jurisprudence in the Security Council—and the interpretation accepted for a long time—that an abstention is not considered a veto, and the concurrent votes of the permanent members mean the votes of the permanent members who participate in the voting. Those who abstain intentionally are not considered to have cast a veto. That is quite clear."

In spite of this statement by the President, the representative of France, Mr. Parodi, felt it necessary to <sup>44</sup>

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40. *Id.* at 244.

41. *Id.* at 245.

42. *Id.* (2nd year), no. 68, 173d Meeting, p. 1711.

43. *Id.*

44. *Id.* at 1713.



"add that, as representative of a permanent member of the Council, I was careful not to vote against the resolution, although I was opposed to it, but merely abstained, in order to facilitate the general progress of our work."

This, it is suggested, is a very relevant incident in evaluating the legal significance of abstention by a permanent member from voting in the Security Council. The abstaining permanent members did not wish to impede the work of the Security Council by casting a "veto"; on the contrary, their abstentions were designed to make it possible for the Security Council to function along the lines indicated by the majority. The words of the President—"those who abstain intentionally"—may be especially significant, though it was hardly possible to speak of "the interpretation accepted for a long time" since the practice had been inaugurated by the Soviet Union barely fifteen months earlier.

### c. The India-Pakistan Question

At the 230th meeting, January 20, 1948, the Security Council voted on a draft resolution providing for establishment of a Commission of Three and designation of the scope of its duties. The vote was nine in favor, none against and two abstentions, one of the abstaining members being the USSR. The President declared the resolution adopted.<sup>45</sup> Mr. Arce (Argentina) at the 232nd meeting, January 23, 1948, made the following statement:<sup>46</sup>

"The resolution which was voted at the meeting of January 20, 1948 . . . did not obtain the favorable vote of the five permanent members of the Security Council. Nevertheless, the vote was considered valid and the Security Council has agreed to carry out this resolution without further observation.

"We have here a decision of substance, and it falls under paragraph 3 of Article 27 of the Charter. The Argentine delegation voted in favor of this resolution and these words do not modify our way of thinking in this connection.

"I consider it my duty, however, to place on record that this decision is invalid legally. I am aware that this is not the first time that this has occurred. It is, however, the first time that it has occurred since Argentina has been elected as a member of the Security Council. . . .

"I wish to place on record, however, that I do not oppose the permanent members of the Security Council renouncing the use of their privilege if they consider it desirable, but when they do so, it should be done publicly."

In reply to this strong statement, which, however, was not a formal

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45. Document S/PV. 230, p. 71.

46. Document S/PV. 232, p. 2.

challenge to the President's ruling, Mr. Noel-Baker (United Kingdom), said: <sup>47</sup>

"Hitherto, as I understand it, the abstention by a permanent member of the Security Council in a vote on a matter of substance is, by practice and precedent in the Security Council, not considered a negative vote by that member, and I hope and trust that that understanding and practice will be adhered to."

Mr. de la Tournelle (France) associated himself fully with the remarks made by the representative of the United Kingdom,<sup>48</sup> and no further action appears to have been taken on this occasion.

d. Application of Israel for Membership in the United Nations

At the 414th meeting, May 4, 1949, the Security Council discussed and voted upon the application of Israel for admission to the United Nations. Before the voting took place, Sir Terence Shone (United Kingdom) declared: <sup>49</sup>

"In the circumstances, my delegation has no alternative but to abstain from voting if the question of Israel's admission comes to a vote. We shall not vote against Israel's admission. We have said in the past that we do not intend to use our privileged vote to block the admission of any State which obtains the requisite majority."

The vote on the United States resolution recommending admission was as follows: in favor: 9; against: 1; abstaining: 1 (the United Kingdom). The Official Records sums up the vote in these words: "The resolution was adopted by 9 votes to 1, with 1 abstention." <sup>50</sup> Immediately after the vote, the President, Mr. A. Alvarez (Cuba), stated: <sup>51</sup>

"In accordance with the principle established by the Security Council on resolutions subject to the unanimity rule, abstention by a permanent member of the Council does not render the Council's decision invalid. I therefore declare the United States draft resolution to be adopted."

These references to "the unanimity rule" and the "established" method of avoiding it did not pass unnoticed. After the President's ruling, Mr. Arce (Argentina) who voted in favor of the resolution, said: <sup>52</sup>

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47. *Id.* at 11.

48. *Id.* at 12.

49. Security Council, *Official Records* (4th year), no. 17, p. 2.

50. *Id.* at 14.

51. *Ibid.*

52. *Ibid.* Norway may also have held doubts as to the validity of the ruling. Mr. Sunde, who expressed the intention of voting in favor of the application of Israel, concluded: "In this connexion, I should also like to point out that we do not think that a decision which

"I do not wish to comment on the President's statement that the Council, having adopted the draft resolution by more than seven votes required by the Charter, has decided to recommend Israel's admission to membership in the United Nations. I wish, however, to go on record as stating that, contrary to the view held by some, if not by practically all the permanent members of the Council, this resolution has not been supported by the five permanent members of the Council as required in Article 27, paragraph 3, of the Charter. While the President has referred to an established principle, I do not believe that the Security Council can establish principles to modify the Charter whenever it thinks fit."

Speaking after Mr. Arce, Mahmoud Fawzi Bey (Egypt), who voted against the resolution, said: <sup>53</sup>

"For reasons similar to those expounded by the representative of Argentina, I wish to express my doubt as to certain interpretations of the way in which Article 27, paragraph 3, of the United Nations Charter should be applied."

Neither speaker, however, formally challenged the ruling of the President. The final word, by Mr. Malik (USSR), was in support of the ruling: <sup>54</sup>

"I would merely like to draw the Council's attention to the fact that, in accordance with the established practice of the Security Council, when a permanent member of the Council abstains from voting, such action is not interpreted in the way that some are now endeavouring to interpret it."

This cryptic remark closed the discussion. It was re-opened in the *Ad Hoc* Political Committee of the General Assembly at the second part of its third session and subsequently in the plenary meetings of the General Assembly itself. The application of Israel was discussed in Committee at the 42nd and subsequent meetings. Some representatives doubted the validity of the Security Council's recommendation and challenged it as defective. Some considered it to be valid. As will appear below, the merits of the issue were never decided, since it was ruled that the General Assembly had not the power to question a decision of the Security Council. While it is therefore not necessary to reproduce all the pertinent statements, it is desirable to quote one or two which received special attention. The practice of the Security Council was submitted to a careful scrutiny by Sir Mohammed Zafrulla

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the Security Council might now take to recommend the admission of Israel should be taken as a precedent in respect of the legal questions involved." *Id.* at 4. It is not clear from this statement what "legal questions" Mr. Sunde had in mind. Reference may have been made to the preceding declaration of the representative of the United Kingdom.

53. *Id.* at 14.

54. *Ibid.*

Khan (Pakistan) who raised a preliminary question officially reported as follows:<sup>55</sup>

"The Committee was proceeding on the assumption that the Security Council had recommended the admission of Israel to membership in the United Nations. The record of the voting in the Security Council, however, disclosed that one of the permanent members, the United Kingdom, had registered an abstention. Accordingly, the provision of Article 27 of the Charter had not been observed. . . .

"He was aware that the Security Council had proceeded on the basis of a practice it was trying to establish whereby the abstention of a permanent member in decisions of a substantive nature was not to be treated as a veto. Paragraph 3 of Article 27, however, did not mention the veto; it merely stipulated that the concurring votes of the permanent members must be included in the seven or more affirmative votes necessary for the adoption of substantive decisions. Moreover, regardless of the interpretation placed by the Security Council in its own practice on the abstention of a permanent member, the General Assembly was not bound by any action taken by the Council which failed to comply with the explicit terms of Article 27.

"The record of the Security Council's proceedings further revealed that when the vote had been taken, the President had stated that although the decision was governed by the rule of unanimity, the abstention of a permanent member did not invalidate it, inasmuch as it had obtained more than the seven affirmative votes required by the Charter. Two members of the Council had taken exception to that interpretation. . . .

"Moreover, the United Kingdom, which had abstained from voting in favour of the Council's recommendation to admit Israel to membership, had both generally and specifically made it clear that its abstention could not be construed as an affirmation. . . . Clearly, the United Kingdom had not concurred in the decision of the Security Council on the admission of Israel because it had not been satisfied that the applicant State fulfilled the conditions laid down in Article 4 or that the merits of the case warranted an affirmative vote.

"In view of those considerations, the Committee had before it no Security Council decision which had been taken in accordance with the conditions laid down in the Charter. Should any member of the Committee not agree with him on that subject, it would be necessary to clarify the interpretation of Article 27. That could be done either by referring the matter to the International Court of Justice with a request for an advisory opinion, or by sending the recommendation back to the Security Council in accordance with rule 126

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55. *Official Records* of the 3rd session of the General Assembly. Part II, *Ad Hoc* Political Committee, Summary records of the Meetings, April 6-May 10, 1949, p. 181.

of the rules of procedure. Surely, the General Assembly could take no decision until it had dispelled all doubt concerning the regularity of the Council's recommendation to admit Israel to membership."

At the subsequent meeting, the 43rd, on May 4, 1949, Sir Terence Shone (United Kingdom) <sup>56</sup>

"... recalled the argument advanced at the preceding meeting by the representative of Pakistan to the effect that the Security Council's recommendation on the admission of Israel was invalid because it failed to comply with the terms of paragraph 3 of Article 27. While he did not wish to debate the legal interpretation of that Article, Sir Terence did wish to emphasize certain other considerations which should be borne in mind.

"In addition to the laws and rules which governed the conduct of the various United Nations organs, they had established certain practices which had acquired great force. Since July 1946, a practice had been created in the Security Council whereby a permanent member could, by abstaining from the vote, permit the Council to take action which that member did not affirmatively support, provided that such action had been approved by the affirmative votes of seven members. That procedure had been explicitly sanctioned by all five permanent members on various occasions.\*

"On 14 April 1949, the General Assembly had sanctioned that practice by adopting a resolution based on the conclusions contained in the report of the Interim Committee relating to the voting procedure in the Security Council.\*\* By a vote of 43 to 6, with 2 abstentions, it had recommended *inter alia* to the permanent members that they give favourable consideration to the possibility of forbearing from exercising their veto when seven affirmative votes had already been cast in favour of certain decisions, among them, recommendations to the Assembly on the admission of new Members.

"Irrespective of the strictly legal position, it was unwise to abandon a practice whereby the permanent members of the Council were attempting to avoid hampering decisions by exercising their veto. However, the United Kingdom delegation was not anxious to prevent the Assembly from examining the whole question. Its position had been made clear when it had abstained from voting on the Security Council's recommendation to admit Israel to the United Nations. It had abstained on the grounds that it did not wish to use its privileged vote to block the admission of any State which obtained the requisite majority. . . ."

The validity of the Security Council's resolution was formally

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56. *Id.* at 200.

\*Discussion of Indonesian question, p. 9.

\*\*See *Official Records* of the 3rd session of the General Assembly, Part II, 195th plenary meeting.

challenged by Mr. Abbas (Iraq) who submitted a draft resolution which referred to Article 27, paragraph 3, of the Charter and continued as follows: <sup>57</sup>

"Considering that it is difficult to consider an abstention by one of the permanent members of the Security Council as an affirmative vote of concurrence,

"The General Assembly resolves that:

"1. An inquiry should be sent to the Security Council seeking further explanation for the validity of the vote taken with regard to the application of Israel to membership in the United Nations, and,

"2. Aside from any explanation which might be forthcoming from the Security Council, and without prejudice to the discussion of the merits of the case, find it necessary to seek an advisory opinion from the International Court of Justice upon whether a vote of abstention by a permanent member of the Security Council can be considered a vote of concurrence or whether such a vote can be consonant with the provisions of paragraph 3 of Article 27 of the Charter of the United Nations and therefore this Committee instructs the Secretary-General of the United Nations to take the necessary measures to obtain the advisory opinion of the International Court of Justice on this matter at the earliest possible date and to forward such information as might be obtained to the Committee concerned with this matter."

When the issue had been first raised in the Political Committee, the Chairman, General Carlos P. Romulo (Philippines), had ruled that "It was beyond the competence of the Committee to question the regularity of the vote in the Security Council and the validity of the decisions taken." <sup>58</sup> Under this ruling, the merits of the Abbas resolution could not have been reached. The Chairman therefore declared his willingness to put the ruling to vote. <sup>59</sup> Mr. Abbas stated that he was not challenging the ruling, and the question was dropped temporarily. It arose again, however, at a later stage of the discussion, at the 44th meeting, May 4, 1949, when General Romulo, on his own behalf, recalled his ruling, this time in more specific terms: <sup>60</sup>

"On the previous day he had ruled the Iraqi draft resolution (A/AC.24/64) out of order because it challenged the validity of the Security Council resolution recommending the application of Israel for admission to membership in the United Nations. That ruling still held [but] would be put to the vote if the Iraqi representative insisted on his proposal."

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57. Document A/AC.24/64.4, May 1949.

58. *Official Records* of the 3rd session of the General Assembly. Part II, *Ad Hoc* Political Committee, Summary records of the Meetings, April 6-May 10, 1949, p. 183.

59. *Id.* at 189.

60. *Id.* at 203.

The Iraqi representative did not insist but reserved his right to raise the point in the Committee or in the General Assembly at a later date.<sup>61</sup> Thereupon,<sup>62</sup>

“The Chairman said that since the Iraqi delegation had withdrawn its draft resolution, while reserving its right to present it at a later date, a discussion of that draft resolution or any reference to it would henceforth be declared out of order.”

The issue was raised again a week later at the 207th Plenary Meeting of the General Assembly, held May 11, 1949. The Iraqi representative “reiterated his request that the General Assembly should consult the International Court of Justice on the matter of the Security Council’s recommendation and remarked that, by rejecting that request, the Assembly would tacitly admit that its course of action was illegal.”<sup>63</sup> Before putting the question of the admission of Israel to a vote, the President of the General Assembly, Dr. H. V. Evatt (Australia), explained the manner in which it had come before the General Assembly and said:<sup>64</sup>

“In accordance with the provisions of Article 4, of the Charter, the Security Council had formally recommended the admission of Israel to membership in the United Nations (A/818). Referring to the suggestion that the General Assembly might discuss the question of the vote which had taken place in the Security Council, the President ruled that the manner in which the recommendation of the Security Council had been adopted concerned the internal government and procedure of the Security Council and must be accepted by the General Assembly as a recommendation of the Security Council within the meaning of the Charter. The President did not doubt that the ruling of the Chairman of the Ad Hoc Political Committee was correct.”

The President’s ruling was not challenged.

e. Application of Portugal for Membership in the United Nations

On September 13, 1949, at the 443rd meeting of the Security Council the application of Portugal was put to the vote and received nine votes in favor and two votes against. One of the negative votes was that of the Soviet Union. Mr. Arce (Argentina) made a statement after the vote in which he said:<sup>65</sup>

“that four permanent members voted in favor, exactly as in the

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61. *Id.* at 206.

62. *Id.* at 209.

63. *Official Records* of the 3rd session of the General Assembly. Part II, p. 310.

64. *Id.* at 330. See also observations by Mr. Nisot (Belgium), *id.* at 190, and Mr. Fawzi Bey, *id.* at 191.

65. Security Council, *Official Records* (4th year), no. 41, p. 29.

vote on the application for the admission of the state of Israel which was submitted for consideration by the General Assembly.

"I know that it will be objected that while, in the one case there was an abstention—that of the United Kingdom—in the other case there was an opposing vote by the Soviet Union.

"The Charter, however, does not distinguish between abstentions and negative votes. It says simply that the concurring votes of the five permanent members are necessary. In the voting on Portugal there were only four, as in the voting on Israel."

### 3. *Conclusions*

What conclusions, then, may be drawn from the practice of the Security Council regarding abstention? Any even tentative conclusion must, of course, be tempered by the fact that United Nations practice is ambiguous and brief. And it may be premature to speak of a "common law" which has developed in the Security Council on the basis of or in opposition to the Charter. Nevertheless, the following remarks seem in order.

One conclusion stands out: no substantive resolution in the voting of which a permanent member abstained but which received the requisite majority of seven, has been held invalid or illegal. Some members of the Security Council and some other members of the United Nations have, however, raised direct or indirect questions as to both.<sup>66</sup> In fact, there is some basis for criticism. As has been pointed out above,<sup>67</sup> the practice of treating an abstention as in result an affirmative vote, is not in literal conformity with the mandatory requirement of Article 27, paragraph 3. It therefore also technically violates the Provisional Rules of Procedure of the Security Council. Under Rule 40 "voting in the Security Council shall be in accordance with the relevant Articles of the Charter and of the Statute of the International Court of Justice."<sup>68</sup> This rule incorporates the requirements of Article 27, paragraph 3, into the structure of the Provisional Rules. It is a mandatory rule, directing the Council to vote in accordance with the Charter, and provides for no exception and no mitigation of its rigor. There is, of course, no legal duty for a permanent member to vote in the negative.<sup>69</sup> But if he does not vote in the affirmative, the effect should at

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66. See pages 219–23 *supra*. It should be repeated, however, that the General Assembly never really attempted to pass on the validity of resolutions of the Security Council. The ruling of the President of the General Assembly, Mr. H. V. Evatt, in connection with the application of Israel, was explicit and was not challenged.

67. See pages 209–10 *supra*.

68. Provisional Rules of Procedure of the Security Council. Document S/96/Rev. 3, January 27, 1948.

69. It has been said that "there was no principle laid down in the Charter, nor did any precedent exist to the effect that a country which had the right of veto was obliged to vote in the affirmative or in the negative." Mr. Zaydin (Cuba) in the *Ad Hoc* Political Committee. *Official Records loc. cit.*, p. 207.



least theoretically be the same. The literal requirement for adopting valid substantive decisions in Article 27, paragraph 3, reinforced by Rule 40 of the Provisional Rules of Procedure, is not satisfied by abstention.<sup>70</sup>

Despite the force of these arguments, it is the opinion of the writer that the practice of abstention, although not in conformity with Article 27, paragraph 3 and Rule 40, nevertheless may be deemed to be in accordance with the principle of unanimity of the permanent members. It is this principle which underlies Article 27, paragraph 3, and which forms the basis of the agreement reached at the Yalta Conference on the voting formula to govern the Security Council. It will also be recalled that at the San Francisco Conference the Four Sponsoring Governments and France attached the greatest importance to the principle of unanimity. In the "Statement of the Delegations of the Four Sponsoring Governments on Voting Procedure in the Security Council," these Governments, arguing that beyond a certain point "decisions and actions by the Security Council may well have major political consequences and may even initiate a chain of events which might, in the end, require the Council under its responsibilities to invoke measures of enforcement," declared,<sup>71</sup>

"This chain of events begins when the Council decides to make an investigation, or determines that the time has come to call upon states to settle their differences, or to make recommendations to the parties. It is to such decisions and actions that unanimity of the permanent members applies, with the important proviso . . . for abstention from voting by parties to the dispute."

The compatibility of abstention with the principle of unanimity, which is argued here, may be demonstrated by reference to the Covenant and the practice of the League of Nations.

Article 5 of the Covenant, with some exceptions, required in both the Assembly and the Council "the agreement of all the Members of the League represented at the meeting." In the practice of the League Assembly and Council, abstention was not regarded as a negative vote and, consequently, was not considered incompatible with the principle of unanimity laid down in Article 5. Article 19, paragraph 5, of the Rules of Procedure of the Assembly<sup>72</sup> and Article IX, paragraph 3 of the Rules of Procedure of the Council provided accordingly. Article

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70. There have been attempts to read Article 27, paragraph 3, as if it said that decisions shall "be made by an affirmative vote of seven members including the concurring votes of the permanent members *present and voting*." The phrase "present and voting," however, was not only omitted from the text, but was specifically rejected at the San Francisco conference. See pages 251-52 *infra*. For specific use of the phrase, see Articles 18, 67, and 89 of the Charter, and Rules 86 and 125 of the Rules of Procedure of the General Assembly.

71. UNCIO Documents, Vol. XI, p. 712.

72. RULES OF PROCEDURE OF THE ASSEMBLY. Rev. Ed., April 1937. C.144.M.92.1937.

IX, paragraph 3, recognizing a practice of long standing in the Council, stated explicitly: "In counting the votes, abstentions from voting shall be disregarded."<sup>73</sup> In accordance with Article 5, paragraph 1, of the Covenant, however, this clause could not prevail over exceptions expressly provided in the Covenant such as in Article 16, paragraph 4, concerning expulsion. This Article was one of the exceptions to the principle of unanimity enunciated in Article 5, paragraph 1, in the sense that it required not merely "the agreement of all the members of the League represented at the meeting," but a "vote of the Council concurred in by the Representatives of all other members of the League represented thereon," *i.e.* of all members represented on the Council other than the member to be expelled.<sup>74</sup> This special voting requirement was more stringent than the general rule of unanimity in Article 5 of the Covenant.

It might be argued that Article 27, paragraph 3, being closer in its wording to Article 16, paragraph 4, than to Article 5, paragraph 1, of the Covenant, should be interpreted in the same manner. It must be borne in mind, however, that Article 16, paragraph 4, was an exception to the general principle of unanimity. On the other hand, it was specifically stated in the Statement of the Four Sponsoring Powers referred to above that there was "no question under the Yalta Formula of investing [the permanent members] with a new right, namely the right of veto, which the permanent members of the League Council always had." So far as the permanent members of the Security Council are concerned, therefore, the Charter, like the League Covenant, with only explicit exceptions, simply incorporated the principle of unanimity as it is established in international law and relations. On this ground, the analogy to Article 5, paragraph 1, and to the practice of the League thereunder seems defensible. If this reasoning is admitted, the abstention of the permanent members is not inconsistent with the principle of unanimity embodied in Article 27, paragraph 3 of the Charter. The controlling consideration is agreement even if it be no more than tacit agreement to the action which the Security Council, supported by the requisite majority of seven, proposes to take. As long as this agreement is there, the Security Council may act.

Moreover, as Sir Terence Shone pointed out in his important statement quoted above,<sup>75</sup> the General Assembly itself, in paragraph 3 of its Resolution 267 (III) adopted April 14, 1949, seemed to encourage the practice of abstention. "In order to avoid impairment of the usefulness and prestige of the Council through excessive use of the veto,"

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73. RULES OF PROCEDURE OF THE COUNCIL. June 1938. C.197.M.106.1938. Paragraph 3, quoted above was added to the Rules adopted in 1920.

74. Leo Gross, *Was the Soviet Union Expelled from the League of Nations?*, 39 AM. J. OF INT'L. LAW 36 (1945).

75. See page 221 *supra*.

the General Assembly recommended that the permanent members consult on important decisions. In particular, in paragraph 3(c), it recommended that: "If there is not unanimity, [they] exercise the veto only when they consider the question of vital importance, taking into account the interest of the United Nations as a whole, and to state upon what ground they consider this condition to be present."<sup>76</sup> At a meeting held October 18, 1949, all permanent members agreed to paragraph 3 of Resolution 267 (III).<sup>77</sup> It will be noted, no doubt, that according to that paragraph abstention is considered compatible with unanimity.

Some consideration should be given to the circumstance that on several occasions noted above, members of the United Nations either voiced doubt as to the validity of the practice of abstention or declared that their acceptance or toleration of that practice should not serve as a precedent. This may have been deemed necessary in order to safeguard the integrity of Article 27, paragraph 3. It seems clear, however, that this abundance of caution was superfluous, since no mere practice could change the strict requirement of Article 27, paragraph 3. In other words, abstention is not a fatal defect as long as there is agreement in the Security Council, and particularly among its permanent members, not to regard it as such.<sup>78</sup> This is perhaps another way of saying that the practice of abstention rests on sufferance rather than on a rule of the Charter, or a binding precedent, or an explicit and formal agreement of the permanent members of the Council. In short, it presupposes the continued disposition of those members not to regard abstention as failing to satisfy the mandatory requirement of Article 27, paragraph 3. It cannot be presumed or enlarged without their consent. On the contrary it must be indicated in each case, explicitly as by an explanation of the vote, which was the case in connection with some resolutions, or tacitly as was also the case in several instances. This type of agreement, tenuous as it may appear to be in the light of the literal provisions of the Charter, has been manifested

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76. *Official Records* of the 3rd session of the General Assembly, Part II; Resolutions. Document A/900, p. 7.

77. Security Council, *Official Records* (4th year), no. 48, p. 2.

78. Liang, *supra* note 2, at 359, says: "In spite of the uncertainty of the legal consequences of the abstention of the Soviet representative in the Spanish question, there is reason to believe that, in the practice of the Security Council, abstentions by permanent members will not be counted as negative votes, just as before the adoption of Article 9 of the Rules of Procedure by the League Council in 1933 the practice was to disregard, in the counting of votes, abstentions from voting. This development will probably be based upon the theory that a permanent member who has the opportunity to exercise its veto power but chooses to refrain from exercising it should not be obliged to have its abstention counted as a negative vote—a development which may be accepted by the permanent members themselves as a means to mitigate the rigours of the 'veto.'"

in a variety of cases falling under different provisions of the Charter including limited resolutions under Articles 39 and 40.

It should be noted at this point, however, that the usefulness of agreement by sufferance has its limits. There is no case on record where the Security Council has adopted a resolution under Article 39 or otherwise recommending or deciding the use of armed force, and where a permanent member agreed by abstaining. This is as might be expected. It seems inconceivable that a permanent member would abstain from voting if a resolution looking to the use of force were put to the vote. It may be well to recall in this connection the Statement of the Four Sponsoring Powers which is most explicit on this point:<sup>79</sup>

"In view of the primary responsibilities of the permanent members, they could not be expected, in the present condition of the world, to assume the obligation to act in so serious a matter as the maintenance of international peace and security in consequence of a decision in which they had not concurred."

The Statement is the only interpretation of the Yalta voting formula on which the five permanent members were able to agree at San Francisco. Agreement there was dictated by reality. Conviction, not mere sufferance, is needed to enforce measures for the maintenance of international peace and security. It is for this reason that the Sponsoring Powers did not refer to unanimity as in other parts of the Statement, but to unanimity qualified in a way which throws into prominence the need for concurrence of each permanent member.

Commentators without exception have realized and pointed up the need for this extension of the unanimity principle. For example, Dr. Pasvolsky, commenting on the Statement before the Senate Committee on Foreign Relations stated: <sup>80</sup>

"When [a permanent member] is not a party to the dispute, then the action taken by the Security Council may lead to a chain of measures in which [that member] would have to participate, and since that claim may end up with the use of force, it was thought that the countries which would have the primary responsibility for the action to be taken in the maintenance of international peace and security should be in a position to concur or not to concur in the steps which might lead to that action."

The quoted passage is typical. Implicit in its explanation is recognition of the fact of force. It is due to this fact that, although the so-called "veto" has been the object of frequent criticism, no proposal for ameliorating its use and obviating its consequences has denied that the

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79. UNCIO Documents, vol. XI, p. 713.

80. *Hearings* 283. The Chairman, Senator Tom Connally, said: "Since unanimity is going to be required in the final analysis on the use of force, we had better maintain that same principle from the beginning of the dispute." *Id.* at 284.

veto should be maintained in cases under Chapter VII of the Charter, involving enforcement measures.<sup>81</sup> The reason for this is not obscure. As the use of force to prevent or repel aggression is one of the fundamental objectives of the United Nations, and the principle that responsibility should be commensurate with power one of its basic assumptions, so is the use of force linked with responsibility and power. As the head of the United States Delegation to the San Francisco Conference pointed out in his Report to the President:<sup>82</sup>

"The Council is to use the power of the member states in accordance with the realities of the distribution of power. The voting procedure of the Security Council is expressive of the actualities of the possession and the exercise of power in the modern world. The five principal military powers of our time are made permanent members of the Council. *Furthermore, in order that their possession of power and their use of power may be made to serve the purpose of peace, it is provided that they shall exercise their power only in agreement with each other and not in disagreement.*"

## II. ABSENCE FROM THE SECURITY COUNCIL

There are not many cases on record where a permanent or a non-permanent member of the Security Council was absent from a meeting of the Council in the course of which resolutions were put to the vote. It is possible, however, to find in the records of the Security Council some such instances preceding the prolonged absence of the Soviet Union from the Council from January 13 to August 1, 1950.

### 1. *The Iranian Question*

In the course of the debate on this question, Mr. Gromyko (USSR) declared at the 27th meeting of the Security Council, March 27, 1946, after the rejection of his proposal to postpone the consideration of this question until April 10:<sup>83</sup>

" . . . I am not in a position as the representative of the USSR, to take part in a discussion of the Iranian question after the rejection of my proposal. For these reasons I am unable to take part in the Council meeting and I am leaving the Council chamber."

He thereupon left the Council Chamber. The Soviet Union was not represented at the 28th, 29th, and 30th meetings, and was not included in the list of those "present" in the Official Records of the Security Council. Its absence was not otherwise recorded. The Secur-

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81. See *Official Records* of the 2d part of the 1st session of the General Assembly, First Committee, p. 84-127, and specifically the Australian proposals of November 8, 1946, p. 323.

82. *Hearings* 41 (Italics supplied). See also the British Commentary on the Charter of the United Nations, Misc. No. 9 (1945), Cmd. 6666, nos. 85, 87.

83. Security Council, *Official Records* (1st year), no. 2, p. 58.

ity Council meanwhile continued its business without Mr. Gromyko.<sup>84</sup> At the same meeting as that of the walkout, its 27th on March 27, 1946, the Council put to a vote and adopted an Egyptian proposal to invite the Iranian representative to come to the Council table. Before putting this to a vote, the President of the Council, Mr. Quo Tai-chi (China), said:<sup>85</sup>

"I understand that, since this is a purely procedural question, a decision can be taken even in the absence of the USSR representative. If that interpretation is correct, we shall proceed with the voting."

No formal vote was taken at the 28th and 29th meetings, but at its 30th meeting, April 4, 1946, the Security Council adopted a United States draft resolution "by 9 votes." This resolution, taking note of certain statements by the Soviet and Iranian governments, provided in its operative part for deferment of further proceeding on the Iranian appeal until May 6. In a letter to the President of the Council, dated April 6, 1946, Mr. Gromyko, argued that the Security Council should not have considered the Iranian question and that this question should be removed from the agenda of the Council:<sup>86</sup>

"The Soviet Government, moreover, cannot ignore the resolution adopted by the Security Council on 4 April. Under this resolution the Security Council decided to continue the consideration of the Iranian question on 6 May despite the fact that on 3 April the Soviet Government stated that the question of the evacuation of Soviet troops had been settled by an understanding reached between the Soviet and Iranian Governments. Such a resolution of the Security Council might have been well-founded if the position in Iran had threatened international peace and security, as provided in Article 34 of the Charter of the United Nations.

"Under the Charter, the Security Council may investigate any dispute or any situation which might endanger the maintenance of international peace and security. It is, however, quite obvious that in fact such a position did not and does not now exist in Iran, so that the Security Council had no reason to give further consideration to the Iranian question on 6 May.

"Accordingly, the above-mentioned resolution of the Security Council of April 4 is incorrect and illegal, being in conflict with the Charter of the United Nations."

At the 32nd meeting, April 15, 1946, Mr. Gromyko amplified somewhat his arguments why the April 4 resolution was "contrary to both

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84. *Id.* at 58 *et seq.*

85. *Id.* at 60. Sir Alexander Cadogan (United Kingdom) thereupon noted that the proposal "still requires seven unqualified votes." This remark, however, seems to have been made purely for purposes of clarification.

86. Document S/30, April 8, 1946.

the meaning and to the letter of the Charter." The situation on Iran, he stated, was not a threat to the peace within the meaning of Article 34. Moreover, the Security Council had failed to hear both parties directly concerned in the dispute, and also failed to decide that the question constituted a dispute or a situation justifying Council consideration.<sup>87</sup>

The Soviet position met with opposition. In the ensuing discussion, Mr. van Kleffens (Netherlands) observed that<sup>88</sup>

"The veto right of the great Powers is a limited right and therefore cannot be extended beyond the terms of the Charter by the great Power which is a party to a question before the Council, simply by absenting itself from the Council's deliberations."

He wanted to "make it quite clear that the Council never took up the Iranian case on its merits but only the question as to whether the examination of the merits of the case should or should not be postponed." Sir Alexander Cadogan (United Kingdom) pointed out that the April 4 resolution "merely resolved that the Council defer further proceeding" for certain purposes and said:<sup>89</sup>

"That is the point of the Council's resolution, and I maintain that it could be held that that was hardly more than procedural."

And Colonel Hodgson (Australia) stated:<sup>90</sup>

"As to the view that the action taken by this resolution was illegal, incorrect and contrary to the Charter, whatever we may individually think about the resolution, whether we think it right or wrong, wise or unwise, it was a decision properly taken with the requisite majority by this Council. It conflicts with no rules of procedure and we are bound by it. Further, I can find nothing in the Charter which shows that it does so conflict."

It would seem to follow from this exchange of views that the Soviet representative did not attack the April 4 resolution on the ground that it was adopted in his absence but on other grounds. The validity of the resolution, moreover, was defended on the same level. By both sides, the resolution was considered to be procedural in character and therefore one that merely required the vote of any seven members of the Council. Mr. van Kleffens's remarks are not entirely clear but they may be understood to mean that by absenting itself from the Council the permanent member acquired no additional rights—that is, it could not thereby in effect veto procedural action so as to prevent the

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87. Security Council, *Official Records* (1st year), no. 2, p. 124.

88. *Id.* at 128.

89. *Id.* at 130.

90. *Id.* at 132.

Council from carrying on its business and adopt resolutions of a procedural character.

At the 36th meeting, April 23, 1946, the Council having rejected a French draft resolution proposing in fact to remove the Iranian question from its agenda, Mr. Gromyko (USSR) declared that he considered the decision to retain the question on the agenda to be "contradictory to the United Nations Charter" and he felt that the Soviet delegation "cannot in the future take part in discussions of the Iranian question by the Security Council."<sup>91</sup> As a consequence, the Soviet Union was absent from the 40th meeting, May 8, 1946, in the course of which the problem of the legal effect of the absence of a permanent member upon the ability of the Council to function was discussed at some length. Emphasizing the gravity of the problem, a problem "which goes right to the foundations of the working of the Security Council," Mr. Hasluck (Australia) stated:<sup>92</sup>

"It seems to us that if a member of the Council absents himself from the Council, he is establishing a situation which affects not only his own position as a member, but also the functioning of the Council, and we should like to reach some clearer idea of what is the exact consequence of such action.

"It is obviously not a matter which the Council can resolve this afternoon, but we suggest it is a matter which the Council must resolve in the very near future. When a member so absents himself, does that mean that he has voluntarily surrendered for the time being his powers and responsibilities as a member of this Council? . . .

"It seems to us that if a member refuses to participate, or fails to participate, in the work of this Council, then for the time being he abandons the special powers which accrue to him as a member, and has no powers greater than those of any other Member of the United Nations. . . .

"The Australian delegation does not admit that the absence of a member affects the voting procedure. That is a matter on which we make no pronouncement at the present time; but that the Council should ever be asked to entertain the idea that by absenting himself one of its members can bring into question its ability to function or take any action does seem to us to be most dangerous and the beginning of a system which would rapidly prove unworkable. Even if we adopt so simple a resolution as the one before us today, it may be that the constitutionality of that resolution will, rightly or wrongly, be called into question because of the absence of a member."

And he suggested that "the first step towards resolving this question

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91. *Id.* at 214.

92. *Id.* at 248-250.



must be to obtain from the absent member a clearer idea of what he claims is the effect of his absence." Sir Alexander Cadogan (United Kingdom) did not think that the problem was quite so grave and said:<sup>93</sup>

"The absence of one of our number from this table does not halt the Council's work. We sit here and function. As regards a quorum, I believe we have no rule relating to a necessary quorum, unless you could infer something from the voting rule which requires that any actual resolution or decision requires an affirmative vote of at least seven members."<sup>94</sup>

Absence, in his view,

"may be considered to a certain extent to amount to an evasion of that responsibility [*i.e.*, to all the Members of the United Nations]. Well, that is a matter which any member of the Council must settle with his own conscience. But, as regards the effect of his absence upon the action of the Council or upon the voting, I cannot see that there is really any difference between absence from this table or presence at the table and abstention from a vote. It seems to me that the general effect is the same. There is a difference in some ways; that is to say, the absence certainly does imply some sort of evasion of responsibility or obligations, and may in some cases reduce the authority of the Council, but I cannot see that it has any actual effect upon the ability of the Council to take a decision, any more than has sitting in a chair and abstaining from voting."

Mr. van Kleffens (Netherlands) brought the discussion from the level of abstract or general argument to that of the concrete question before the Council and said:<sup>95</sup>

"When I read the draft resolution presented by the representative of the United States, I thought that in spite of the absence of the representative of the USSR we could legitimately adopt this resolution because it is clearly a matter of procedure, so that the

93. *Id.* at 251.

94. The question of the quorum is not discussed further here since Sir Alexander furnished the proper answer. Whereas Article VIII of the League Council's Rules of Procedure required a quorum of the majority of members, the Provisional Rules of Procedure of the Security Council are silent on the matter. Hence, the presence of at least seven members is required for decisions of a procedural nature, and the presence of at least two non-permanent members and five permanent members is required for decisions on all other matters. This follows from Article 27, paragraph 3. See, however, Kelsen, *op. cit. supra* note 3, at 244: "Since there is no special rule concerning the quorum for decisions of the Security Council, the presence of all members of the Council is required for the adoption of a resolution. However, in the practice of the Security Council absence of a member, even of a permanent member, does not prevent this body from adopting a resolution." See discussion page 245, *infra*.

95. Security Council, *Official Records* (1st year), no. 2, p. 251.

affirmative vote of seven members, whether permanent or not, is sufficient."

Referring to Mr. Hasluck's statement, Mr. van Kleffens observed

"It seems to me that we must give an answer to one of the questions which he raised—although I hardly thought myself that it was or could be a question at all—namely, whether the Council can legitimately adopt a resolution on a matter of procedure in spite of the fact that one member of the Council has chosen to be absent. . . .

"It cannot be the intention of the Charter to give to any member of the Council, whether a permanent or not, the power to prevent a resolution from being adopted by the simple expedient of absenting himself.

"I therefore think that we can quite legitimately adopt a resolution on the matter of procedure; and may I recall that without this question being explicitly raised, we implicitly took that point of view on a previous occasion. As to the possibility of taking a decision on the question of a permanent member's right to absent himself, I should like to reserve my opinion. It seems to me that we need not go into that point this afternoon."

The United States resolution to defer further proceedings on the Iranian matter "was adopted without objection" and, of course, without formal note that the Soviet representative did not participate in the voting.<sup>96</sup> At the 43rd meeting, May 22, 1946, again in the absence of Mr. Gromyko, the Security Council adopted the President's proposal to adjourn the discussion of the Iranian question.

This was the first time that the Security Council was faced with the absence of one of its permanent members. It is important to observe first that the Security Council continued to discuss the Iranian question; second that it adopted resolutions which seem to have been regarded as procedural and not as substantive; third that although it was invited to give attention to the serious problem created by the absence of a permanent member, the Security Council as a body did not do so; and fourth, that the Security Council made no effort "to obtain from the absent member a clear idea of what he claims is the effect of his absence," although that seemed to Mr. Hasluck to be "the first step towards resolving this question."<sup>97</sup> Thus the question of principle raised by the absence of the Soviet representative, the question which, as Mr. Hasluck put it "goes right to the foundation of the working of the Security Council," was left undecided by the Council. The Council was content to deal with the question at hand, namely its competence to adopt procedural resolutions. This was

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96. *Id.* at 252.

97. *Id.* at 250.

answered in the affirmative; not explicitly, to be sure, but as Mr. van Kleffens suggested, implicitly.

The absence of the Soviet Union from some meetings of the Security Council on the Iranian question prompted some writers to deductions which are by no means consistent with the record or with each other. According to one view <sup>98</sup>

"In the practice of the Security Council absence of a member, even of a permanent member, does not prevent this body from adopting a resolution. Absence of a permanent member is considered to be equivalent to abstention from voting."

Similarly, it has been said: <sup>99</sup>

"While the question has thus arisen but once, it would appear, on the basis of the Council's action in the Iranian case, that an absence is regarded as having the same legal effect, so far as voting is concerned, as an abstention. It would thus appear that the absence of a permanent member does not prevent the Security Council from taking a decision on a substantive question."

The contrary view has been expressed as follows: <sup>100</sup>

"In view of the fact that on matters of substance the concurring votes of the permanent members is required, the Soviet Delegate by thus absenting himself cast a blanket veto over all substantive decisions which the Council might have decided to take."

None of these statements, it is believed, are well founded. The last view, while it expresses a widely held interpretation of Article 27, paragraph 3, reads into the Security Council treatment of the Iranian question a precedent which does not exist. The Council was not faced with any decision or resolution on the merits of the case. The former views appear to be unfounded for the same reason. It appears from the Official Records of the Council that merely procedural decisions were adopted,<sup>101</sup> that is, resolutions intended to defer and finally to adjourn the consideration of the Iranian question, or to invite the representative of Iran to come to the Council table. While it may be tempting to regard at least certain parts of the April 4 resolution as being substantive in character linked to a procedural operative part, it would seem to be the better part of wisdom to accept the view of those representatives who argued that the resolution was altogether procedural and who professed to have voted accordingly.

98. Kelsen, *op. cit. supra* note 3, at 244.

99. LELAND M. GOODRICH & EDVARD HAMBRO, *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* 223 (rev. ed. 1949).

100. WELLINGTON KOO, JR., *VOTING PROCEDURES IN INTERNATIONAL POLITICAL ORGANIZATIONS* 291, n. 4 (1947).

101. B. A. Wortley, *The Veto and the Security Council Provisions of the Charter*, 23 *BRITISH YEAR BOOK OF INTERNATIONAL LAW* 97 (1946).

## 2. *The Indonesian Question*

The representative of the Ukrainian Soviet Socialist Republic, a non-permanent member of the Security Council, was absent from the 388th, 389th, 390th, 391st and 392nd meetings. In the course of the 392nd meeting, December 24, 1948, a draft resolution submitted by the delegations of Colombia, Syria and the United States was put to the vote. The draft resolution was of a substantive character. The Council first voted separately on the different paragraphs, the amendments thereto, and then on the draft resolution as a whole. Although the Ukrainian SSR was not included in the list of those "present" in the Official Record for that meeting or the four previous meetings, neither was its absence specifically noted. The vote on the first paragraph was recorded as for adoption, 7 to none, with 4 abstentions. Those abstaining were listed as follows: Belgium, France, Ukrainian Soviet Socialist Republic, and the Union of Soviet Socialist Republics. Mr. Jessup (USA) requested some information after this vote and asked: "Is an absent member counted as having abstained?" The President Mr. F. van Langenhove (Belgium) replied:

"It seems to me that he must be counted as having abstained. I do not see how we could act otherwise. Are we agreed on this point?"

Thereupon Mr. Munoz (Argentina) desired "some clarification from the President regarding the counting of the votes," and the President said:<sup>102</sup>

"There are four abstentions, the Ukrainian SSR being among the States which have abstained. Is the representative of Argentina satisfied with this explanation?"

The representative of Argentina was apparently satisfied. Mr. Malik (USSR) explained the absence of the Ukrainian delegate and the voting proceeded. Throughout the voting on the different paragraphs, the amendments thereto, and the resolution as a whole the Ukrainian SSR was listed in the Official Record among the abstaining members. Mr. Tarasenko (Ukrainian SSR) was present at the 393rd meeting, December 27, 1948, and there explained the reasons for his absence, but seems to have raised no question regarding his Government being recorded as abstaining on the resolution adopted on December 24, 1948.

Here there appears to be for the first time in the annals of the Security Council a vote on a substantive resolution taken in the absence of a member of the Council in connection with which the absent member was reported as abstaining. The President went on record as treating the representative of a member Government who in fact was

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102. Security Council, *Official Records* (3rd year), no. 134, p. 30 ff.

absent as if participating and abstaining in the long succession of votes. He might have suggested that an absent member should be recorded as absent, which was the fact, rather than as abstaining, which was not the fact, but was at best a theory regarding absence and at worst a piece of fiction. He did not. Sir Alexander Cadogan's view that there is not "any difference between absence from this table and presence at the table and abstention from vote" was put to use and neither contested by any member present, nor attacked by the absent member after he became a present member.

It will be noted, however, that the absent member was one of the non-permanent members of the Council, whose vote according to Article 27, paragraph 3, was not essential for the adoption of a resolution which otherwise received the requisite number of votes. The value of the incident as a precedent is thereby placed in doubt, since what the Ukraine did—support or vote against the resolution, abstain or withdraw completely—could have had no effect on the outcome. Neither the presence nor the affirmative and concurring vote of this member was required by Article 27. The issue was in effect moot before it could arise at all.

### 3. *Admission to Membership of the United Nations*

At its 445th meeting, September 15, 1949, the Security Council voted on the Soviet draft resolution (S/1340/Rev.2) concerning the admission *en bloc* of all states whose application for membership was then pending in the Security Council. Sir Alexander Cadogan (United Kingdom) presided. The Council first voted on parts of the draft resolution and then on the draft resolution as a whole. The analysis of the latter vote and its result, taken by show of hands, is reported in the Official Records as follows: "In favor: Ukrainian Soviet Socialist Republic, USSR. Against: Canada, etc. Abstaining: China, etc.; Argentina did not participate in the voting. The draft resolution was rejected by 4 votes to 2, with 4 abstentions. One member of the Council did not vote."<sup>103</sup>

What actually happened at this meeting of the Security Council is not entirely clear. Argentina is listed in the Official Records as "present" and also is listed in the breakdown of the votes taken on parts of the Soviet draft resolution.<sup>104</sup> There is no explanation of Argentina's non-participation in the vote on the draft resolution as a whole. Apparently either the representative of Argentina somehow arranged to be present at the meeting yet not participate in the final vote, or was temporarily absent from the Council chamber when the final vote was taken. In either case, the method of recording the result of the vote

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103. Security Council, *Official Records* (4th year), no. 42, p. 45.

104. *Id.* at 30, 40-41.

in this particular case, indicating as it clearly does that Argentina did not in any way participate in the voting, appears preferable to that adopted in the preceding case involving the absence of the Ukrainian Soviet Socialist Republic.<sup>105</sup>

4. *January 13 to July 31, 1950*

At the 461st meeting, January 13, 1950, after the Security Council rejected a motion to unseat the representative of China, Mr. Malik (USSR) declared that <sup>106</sup>

"As regards the Soviet Union, its position in this question is one of principle and is entirely consistent. It will not sit on the Security Council until the representative of the Kuomintang group, who is now illegally occupying a seat in that organ of the United Nations, has been removed from membership of the Council. His presence here is undermining the prestige and authority of the Security Council and of the United Nations as a whole. As a result, the Security Council itself is being transformed into an organ the decisions of which cannot be considered legal in these circumstances.

"In the light of the above, I, as representative of the Soviet Union in the Security Council, have to state that the USSR delegation will not sit on the Security Council as long as the representative of the Kuomintang group has not been excluded from the Security Council.

"At the same time, the USSR delegation wishes to announce that the USSR will not recognize as legal *any* decision of the Security Council adopted with the participation of the representative of the Kuomintang group, and will *not* be guided by any such decisions."

After Mr. Malik had left the Council chamber, Mr. Chauvel (France) formally challenged the "right of the USSR delegation to do what it has just done, namely to refuse to co-operate with the Council" and said: "It does not seem possible to recognize that it has the right totally to paralyse the work of the Council." <sup>107</sup> He was answered by Mr. Gross (U.S.A.): <sup>108</sup>

"The United Nations is strong enough to withstand such tactics as these. The absence of the Soviet Union representative will not prevent us from conducting the business to which we are pledged. It is the view of my Government that the absence of a permanent

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105. This incident is particularly significant as it occurred under the presidency of Sir Alexander Cadogan, who, it will be recalled, in connection with the absence of the Soviet Union in the Iranian case propounded the view that he really could see no difference between absence and abstention. It would seem that in this instance Sir Alexander Cadogan did not follow his earlier view and it would also seem that he did not feel it necessary to adhere to the view expounded by Mr. van Langenhove at the 392nd meeting.

106. *Id.* (5th year), no. 3, p. 10.

107. *Id.* at 13.

108. *Id.* at 14.

member from a meeting of the Security Council in no way diminishes its powers or its authority to act. The Charter provides in Article 28 that 'The Security Council shall be so organized as to be able to function continuously.' We cannot permit the arbitrary action of our Soviet Union colleagues to prevent us from fulfilling our obligation to the Charter."

Between January 13 and June 25, 1950, the Security Council held several meetings at which a number of votes were taken, some clearly procedural in character, some clearly substantive, and some where there may be room for doubt. The Official Records for all these meetings omit the Soviet Union from the list of those "present" but fail to note its absence. On the other hand, the breakdown of the votes as well as their conclusion or summary refer to the absence of the Soviet Union in a formula which varies only slightly. Thus at the 462nd meeting, January 17, 1950, Mr. T. F. Tsiang (China) presiding, the result of the vote on the Yugoslav proposal regarding the agenda is recorded as follows: <sup>109</sup>

In favor: Yugoslavia  
Against: China, etc.  
Abstaining: Ecuador, etc.  
Absent: Soviet Union

Then follows the summary: "The proposal was rejected by 7 votes to 1, with 2 abstentions, one member being absent." At the same meeting a vote on the French draft resolution calling upon the Security Council to transmit to the Commission for Conventional Armament General Assembly Resolution 300 (IV) was reported as follows: <sup>110</sup>

In favor: China, etc.  
Not voting: Yugoslavia  
Absent: Soviet Union

The summary: "The resolution was adopted by 9 votes in favor, one member not voting and one member of the Council being absent." It may be noted here that the Yugoslav delegate, Mr. Bebler, having declared: "I cannot take part in the vote on this question" was correctly reported as "not voting" rather than as abstaining. It may also be noted that Mr. Gross (USA) replying to Mr. Bebler, referred to the absence of a permanent member "which clearly is an absence volunteered by the representative himself and which, I think, the Council has clearly indicated it will not take as a deterrent to its proceeding in an orderly manner with its business." <sup>111</sup> It is not clear, however,

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109. *Id.* no. 4, p. 3.

110. *Id.* at 9.

111. *Id.* at 10.

when, where and how the Council as an organ, distinct from the members composing it, gave the indication to which Mr. Gross referred.

At the same meeting the Security Council voted on the Yugoslav draft resolution to forego the application of Rule 18 of the Council's Provisional Rules of Procedure. The members voting were again classified into "in favor," "against," "abstaining" and "absent." The summary was accordingly: "The paragraphs were rejected by 6 votes to one with 3 abstentions, one member of the Council being absent." <sup>112</sup>

At the 463rd to 469th meetings the India-Pakistan question was discussed. At the 468th meeting, February 28, 1950, the Indian proposal to amend Rule 13 of the Council's Provisional Rules of Procedure was adopted. The Official Records merely report that the proposal was adopted, and contain no breakdown of the vote.<sup>113</sup> At the 470th meeting, March 14, 1950, Mr. H. Viteri Lafronte (Ecuador) presiding, draft resolution S/1461 was put to the vote. The Official Records classify the members voting into "in favor," "abstaining" and "absent" and summarize: "The draft resolution was adopted by 8 votes in favor, with 2 abstentions, one member of the Council being absent." <sup>114</sup> This resolution called upon the Governments of India and Pakistan, *inter alia* to prepare and execute within a period of five months a program of demilitarization. It also envisaged the appointment of a United Nations representative to perform certain functions described therein. The appointment of the representative, Sir Owen Dixon (Australia) took place at the 471st meeting, April 12, 1950, and the Official Records report the Soviet Union as absent in the breakdown of the vote, no summary of the vote being given.<sup>115</sup>

At the 472nd meeting, May 24, 1950, Mr. J. Chauvel (France) presiding, the Council voted on a French draft resolution taking note of the General Assembly Resolution 268 B (III), and deciding "should an appropriate occasion arise, to base its action upon the principles contained therein." In the breakdown of the vote the Soviet Union is reported as absent and the conclusion is: "The draft resolution was adopted unanimously, one member of the Council being absent." <sup>116</sup> Before the vote, Mr. Viteri Lafronte (Ecuador) referred to the absence of the Soviet Union and said: <sup>117</sup>

"It is a matter of concern to all the members of the Council that we are not working with the full membership provided under the Charter at the time when it was drafted. This is not the occasion for us to discuss whether the writers of the Charter were right or

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112. *Id.* at 15.

113. *Id.* no. 10, p. 11.

114. *Id.* no. 12, p. 4.

115. *Id.* no. 13, p. 5.

116. *Id.* no. 14, p. 16.

117. *Id.* at 12.



wrong in providing that there should be five permanent members of the Security Council. That provision is, however, contained in the Charter, and we find that there is some irregularity in our activity when one of the permanent members does not participate and when the question of the representation of one of the other permanent members is so controversial that it cannot perhaps be said that we have the full hundred per cent representation which we would like to have."

This statement is rather significant, revealing as it does a certain awareness of "irregularity" in the activities of the Council under the circumstances. It also reflects somewhat less assurance than was voiced by Mr. Gross a short time before.

The next meeting of the Security Council, the 473rd, convened on June 25, 1950, at the urgent request of the United States, considered the "Complaint of Aggression upon the Republic of Korea." The Council, under the presidency of Sir Benegal N. Rau (India), adopted a resolution noting the armed attack on the Republic of Korea by forces from North Korea, determining this action to constitute a breach of the peace, calling for the immediate cessation of hostilities, calling upon the authorities of North Korea to withdraw their forces to the thirty-eighth parallel, etc. It also called upon all members to render every assistance to the United Nations in the execution of this resolution and to refrain from giving assistance to the North Korean authorities. The resolution was voted first in several parts and then as a whole. The members were again classified in the Official records as "in favor," "abstaining" and "absent" (USSR), and the result formulated as follows: "The resolution as revised was adopted by 9 votes in favor, with one abstention, one member of the Security Council being absent." Similarly the vote on the Yugoslav draft resolution calling for cessation of hostilities, withdrawal of forces and inviting the Government of North Korea to state its case before the Council, was reported as rejected "by 6 votes to one, with 3 abstentions, one member of the Council being absent."<sup>118</sup>

The vote at the 474th meeting, June 27, 1950, on the United States draft resolution recommending that members of the United Nations furnish such assistance to the Republic of Korea as might be necessary to repel the armed attack and to restore international peace and security in the area, was reported in a like manner, indicating clearly the absence of the Soviet Union, and concluding: "The resolution was adopted by 7 votes to one, two members of the Council not voting and one member being absent."<sup>119</sup> Before the vote, the representative of Egypt, Mahmoud Fawzi Bey said: "If the Council desires to vote,

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118. *Id.* no. 15, p. 18.

119. *Id.* no. 16, p. 17.

I shall not be able to participate. I ask that my position be considered as non-participation in voting, and trust that this will be inscribed in the record."<sup>120</sup> The President, Sir Benegal N. Rau, then said: "Like the representative of Egypt, I shall not participate in the voting." Again the members were classified in the vote as follows: in favor, against, not voting, and absent. A similar breakdown of the voting appears in the Official Records on the Yugoslav draft resolution proposing to initiate a procedure of mediation between the parties, etc., which was rejected at the same meeting. Egypt and India were reported as "not voting" and the Soviet Union as "absent."<sup>121</sup> By this time it seems to have become an established practice in the Council to consider "not voting" as a position distinct from abstention.

At the 475th meeting, June 30, 1950, no votes were taken. The Security Council was informed of various communications relating to its previous resolution. Among these was a cablegram of June 29, 1950 (S/1517) from the Soviet Union stating that the Security Council resolution of June 27 had no legal basis. Another cablegram from the Minister of Foreign Affairs of the Korean People's Democratic Republic was received stating that his Government did not consider the discussion and decisions of the Council on the Korean question as lawful in view of the fact<sup>122</sup>

"1. that the Korean People's Democratic Republic was not brought into consultation on the matter and the question of Korea was decided without the participation of the Government of the Korean People's Democratic Republic,

"2. because the representatives of a power such as the Soviet Union were absent from the Security Council and representatives of the great Chinese power were not admitted."

The cablegram from the Soviet Deputy Minister of Foreign Affairs, A. Gromyko, referred to the June 27, 1950, resolution and declared:<sup>123</sup>

"As is known, moreover, the above resolution was passed in the absence of two permanent members of the Security Council, the USSR and China, whereas under the United Nations Charter a decision of the Security Council on an important matter can only be made with the concurring votes of all five permanent members of the Council, viz. the United States, the United Kingdom, France, the USSR and China. In view of the foregoing it is quite clear that

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120. *Id.* at 15. Note that the Yugoslav representative had followed the same procedure at the 462nd meeting. See page 239 *supra*.

121. *Id.* at 16.

122. Document S/1527 and Document S/1527/Corr.1. See also Cablegram dated July 2, 1950, from the Minister of Foreign Affairs of the Korean People's Democratic Republic, Document S/1554.

123. Document S/1517. See also Document S/1523 and Document S/1545 for communications from the Governments of Czechoslovakia and Poland respectively.

the said resolution of the Security Council on the Korean question has no legal force."

The representative of France, Mr. Chauvel, discussing the Soviet arguments recalled his reasoning relating to Article 24, paragraph 1, at the 460th and 461st meetings, and said: <sup>124</sup>

"The delegation of the Soviet Union, by abandoning the Council, has abandoned the Charter. When it returns to the one and to the other, it will find again its right of speech, of criticism, of vote and veto. So long as it has not done so, the USSR Government has no legal or moral basis for contesting the action of the United Nations."

Mr. Austin underscored the fact <sup>125</sup>

"that the freedom-loving people of the world have overcome every obstacle that has been erected in their minds or in their policies in order to take a strong, clear and definite position. By these acts they have overcome timidity, they have overcome the fear that they might perhaps violate some technicality or some strict construction raised solely for the purpose of paralysing or even killing collective action by the United Nations to attain its noble purposes."

At the 476th meeting, held July 7, 1950, the President, Mr. Arne Sunde (Norway), drew attention to the cablegram dated July 6, 1950 (S/1579) from the Soviet Union reiterating the arguments contained in the earlier cablegram of June 29, referred to above. Speaking in this connection, Mr. Alvarez (Cuba) stated: <sup>126</sup>

"The Cuban delegation takes this opportunity to place on record its disagreement with the interpretation given by the Soviet Union in its communication to the Secretary-General (S/1517), regarding the validity of the decisions taken by the Security Council on 25 and 27 June, since it is an established practice in the Council, and one that the USSR has accepted on many occasions, that the abstention of a permanent member from participation in decisions of the Council does not constitute a veto."

At this meeting the Security Council discussed a United Kingdom-French draft resolution for the establishment of a unified command and other matters. Speaking on this, Sir Gladwyn Jebb (United Kingdom) made some observations concerning the character of the action taken so far. These remarks, although not directly linked with the

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124. Security Council, *loc. cit.*, no. 17, p. 8.

125. *Id.* at 11.

126. *Id.* no. 18, p. 7. It should be noted that the Cuban representative here arbitrarily equated absence with abstention, without regard to the application of the principle of unanimity.

problem of absence, have some bearing on the argument to be developed in the concluding part of this paper. Sir Gladwyn said: <sup>127</sup>

"Had the Charter come fully into force and had the agreement provided for in Article 43 of the Charter been concluded, we should, of course, have proceeded differently, and the action by the Security Council to repel the armed attack would no doubt have been founded on Article 42. As it is, however, the Council can naturally act only under Article 39, which enables the Security Council to recommend what measures should be taken to restore international peace and security. The necessary recommendations were duly made in the resolutions of 25 and 27 June, but in the nature of things they could only be recommendations to individual members of the United Nations. . . .

"In any event, since we believe the Security Council is acting under Article 39 of the Charter, its function is not an operative one; all it should do is to make sure that the individual efforts of the members concerned are properly coordinated."

The United Kingdom-French draft resolution was put to the vote and adopted. The Official Records do not list the Soviet Union as absent in the breakdown of the vote but the summary follows the established pattern: "The resolution was adopted by 7 votes to none, with 3 abstentions, one member of the Council being absent." <sup>128</sup>

At the 479th meeting, July 31, 1950 the last meeting of the Security Council held before the return of the Soviet Union representative, draft resolution S/1652 concerning Korean relief submitted by the representatives of France, Norway and the United Kingdom was put to the vote and the result reported in the usual way, to wit: "In favor: China, etc. Abstaining: Yugoslavia. Absent: Soviet Union. The resolution was adopted by 9 votes in favor with one abstention, one member of the Council being absent." <sup>129</sup>

### 5. Conclusions

As the preceding survey shows, the Official Records of the meetings of the Security Council from January 13 to July 31, 1950, with one or two insignificant exceptions,<sup>130</sup> reported the absence of the Soviet Union in the analysis of every vote. The Official Records contain

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127. *Id.* at 3. See discussion pages 254-55 *infra*.

128. *Id.* at 8.

129. *Id.* no. 21, p. 7.

130. Except for votes on non-controversial adoptions of the agenda, there are only two exceptions. One is the vote on the Indian proposal at the 468th meeting to amend Rule 13 of the Provisional Rules of Procedure. There the *Official Records* merely report that the Council adopted the proposal. The other is the vote on the United Kingdom-French resolution adopted at the 476th meeting, where the Soviet Union is not listed as absent in the breakdown of the vote, although the conclusion contains the words "one member of the Council being absent."

no indication that the Security Council pronounced on the question whether the absence of the Soviet Union was analogous or equivalent to abstention from voting, although this view was occasionally expressed by individual representatives of the member Governments comprising the Security Council. Yet, in spite of the officially noted absence of the Soviet Union, a permanent member of the Council, and in spite of the failure of the Council to clarify explicitly the legal effect of such an absence, the various resolutions of a substantive character were reported as "adopted" in the Official Records. How can this remarkable performance be explained, if it can be explained?

It may be useful, before proceeding further, to discuss briefly the question of the quorum in the Security Council, that is whether the Council is properly constituted and is able to take valid decisions if one or more members are absent from its meetings.

There is no explicit provision for a quorum in the Charter. The Provisional Rules of Procedure of the Security Council, unlike those of the General Assembly,<sup>131</sup> or of the Council of the League of Nations,<sup>132</sup> are silent on the subject. This being so it may be possible to argue that in the absence of a rule to the contrary the Security Council is properly constituted, and can make valid decisions, only in the presence of all of the eleven members. Under this interpretation, the Security Council could not function, in the absence of one or more members, as a corporate body deriving its existence and competence from the Charter. However, in the Iranian case involving the absence of a permanent member, and in the Indonesian case involving the absence of a non-permanent member, the Security Council did in fact continue to function. In the former case it considered itself competent to adopt procedural decisions, while in the latter case it adopted substantive decisions. This indicates that until the prolonged absence of the Soviet Union from January to August 1950, the Security Council did not deem the presence of all of its members necessary to constitute a quorum. But it will be noted that prior to that time the Council always included those members whose presence was required for the adoption of procedural or substantive resolutions in accordance with Article 27, paragraphs 2 and 3. With this proviso, the practice of the Council would seem to support the view expressed at the 36th meeting by Sir Alexander Cadogan that the quorum might be deduced from the voting requirement in that article of the Charter.<sup>133</sup>

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131. Rule 68: "A majority of the Members of the General Assembly shall constitute a quorum." Rules of Procedure of the General Assembly. A/520/Rev.1. 1 January 1950. P.12.

132. Article VIII: "The Council shall not discuss or decide upon any matter unless the majority of its members are present." Rules of Procedure of the Council. Doc.C.197.M.106, 1938 p. 4.

133. See page 233 *supra*.

Such an interpretation is not without force. A close link between voting and quorum requirements is not at all unknown in international organization. Such a tie-up, for example, was explicitly provided in Article 19 of the Inter-American treaty of Reciprocal Assistance, signed at Rio de Janeiro on September 2, 1947, which reads: <sup>134</sup>

"To constitute a quorum in all the meetings referred to in the previous Articles, it shall be necessary that the number of States represented shall be at least equal to the number of votes necessary for the taking of the decision."

The position of the members of the Security Council since January 1950, however, cannot be understood in the light of either Sir Alexander's interpretation or the more stringent view that the presence of all members is needed for a quorum. The view sometimes expressed in the Council that by absenting itself from the Council the Soviet Union had violated its obligation under the Charter to participate in the work of the Council has no bearing under either of the two interpretations. The first can properly be said to go no further than to say that any member whose vote is not required may be absent without invalidating Council decisions. As to all questions of substance, therefore, the absence of a permanent member would have the same result under this less stringent test as under the complete membership test—namely, absence of a quorum and accordingly inability on the part of the Security Council to function as a corporate body deriving its powers and competence from the Charter. <sup>135</sup>

No other interpretation can result in any rational stopping place. If the absence of one permanent member is not a fatal defect, as the members of the Council seem to have assumed since January 1950, is there any reason why it should not be argued that the absence of two or more members would similarly not prevent the Council from functioning and taking "binding" decisions? Such consequences, which

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134. *Inter-American Conference for the Maintenance of Continental Peace and Security, August 15–September 2, 1947*, Department of State Publication 3016, p. 63.

135. Said Ambassador Jessup: "The Soviet Union had the legal power to attend the meeting of the Security Council and, by taking the responsibility before the world, to cast a veto to block Security Council action. The USSR did not have the power to block action by staying away from the meeting in violation of its obligations under Article 28." Jessup, *The United Nations and Korea*, 23 DEP'T STATE BULL. 86 (1950). If Ambassador Jessup had in mind that under Article 28 the Soviet Union had the legal duty to attend meetings of the Security Council, then, under Article 28, there would appear to be required a quorum consisting of all of the eleven members of the Council. This is Kelsen's point. See note 94 *supra*. Then in the absence of one member, that is in the absence of a quorum, the Council would not be properly constituted and could not validly discharge any of its functions. It could not even determine that absence is equivalent to abstention, as this could be done only by a properly constituted Council. This in turn would require unanimity of the five permanent members of the Council and the affirmative vote of two other members. Neither of these conditions was present in the Council between January and August 1950.

may well be deemed absurd, are not altogether excluded if the recent practice of the Security Council is continued. As long as, disregarding the mandatory requirement of Article 27, paragraph 3, the Security Council is exclusively concerned in interpreting a vote with finding a majority of seven and no "veto," a vote on matters of substance taken in the absence of four permanent members but concurred in by the remaining one plus the six non-permanent members might be interpreted as a valid vote. This rather surprising result is no more in contradiction with the Charter than the present practice. It is indeed possible to interpret the Charter in more ways than one. However, as far as the voting rule and the quorum in the Security Council is concerned, there is at best a choice between two alternatives, neither of which is capable of supporting the recent practice.

Officially as well as unofficially it is argued in justification of the recent Security Council practice that "the voluntary absence of a permanent member . . . is clearly analogous to abstention."<sup>136</sup> Such a view is at best based on the one precedent in the Indonesian case, which involved a non-permanent member whose absence was involuntary. It will be recalled that at the 392nd meeting of the Security Council, the absent member, the Ukrainian Soviet Socialist Republic, was recorded by the President, Mr. van Langenhove (Belgium), as having abstained from voting despite the fact that that member was in fact absent. Whether this was correct procedure may be left to one side. The important point is that this precedent, if one may properly call it so, was not followed in any other case. In the earlier Iranian case, the Soviet Union, although absent from several meetings in the course of which resolutions were put to the vote, was not reported as having abstained from voting. In the case involving Argentina at the 445th meeting of the Council, Sir Alexander Cadogan as President of the Council did not apply his rather tentative view that there was no difference between absence and abstention. Argentina was correctly reported as not participating in the vote, rather than as abstaining. Moreover, as the votes at the 462nd and 474th meetings of the Council indicate, a member which does not vote is so reported and not classified as abstaining. The Council would thus seem to have recognized a difference between abstention and "not voting".

In the light of this practice and in the absence of any formal pronouncement, it is not easy to see how the argument that absence equals abstention can be attributed persuasive or convincing force. There is an obvious inconsistency: a member which is present and "not voting"

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136. Department of State Publication 3922, *United States Policy in the Korean Crisis*, p. 63. See also Philip C. Jessup, *The United Nations and Korea*, 23 DEP'T STATE BULL. 86 (1950): "Clearly it can make no difference in terms of the application of the Charter on this point whether the representative of a permanent member sits at the table and abstains or whether he fails to come at all."

is considered as not participating in the vote and not as abstaining, whereas a member obviously not present and not participating in the vote is supposed to have participated in the vote and abstained even though, in the case of the Soviet Union, its opposition to the proposed action was conveyed to the Council in unmistakable terms ruling out any attribution of intent to abstain. If the Security Council as a corporate organ has been of the opinion that absence is tantamount to abstention, this fact should have been noted in the Official Records. So important a matter should not be left to inference. Instead, the Official Records consistently reported the Soviet Union as absent during the entire period under consideration. This being so, it is difficult to see how, in the light of the mandatory requirement of Article 27, paragraph 3, the resolutions in question could have been declared "adopted".

This conclusion that the requirement laid down in Article 27, paragraph 3, is not met when one permanent member is officially reported as absent from the meetings and the votes, rather than as abstaining, has been called a "technicality," to use the words of the United States representative (Mr. Austin) at the 475th meeting. It is submitted that this "technicality" is certainly a very important one since Article 27 deals with technical rules governing voting in the Security Council, reinforced by the mandatory Rule 40 of the Council's Provisional Rules of Procedure. Neither the rule nor the requirements of Article 27, paragraph 3, lose any of their overriding political and legal significance by being called "technical." Explicit exceptions are provided in the Charter and in the annexed Statute of the International Court of Justice. And, as has been pointed out, an exception by sufferance has grown up where the Security Council, and more particularly the permanent members, have in effect agreed to let a proposal carry in accordance with the principle of unanimity. But abstention is itself an exception to Article 27, paragraph 3, not provided for in the Charter. It cannot be used as a lever to justify a further exception by an analogy unsupported by all the permanent members of the Council, and, on the contrary, hotly contested by one of them.

That Article 27, paragraph 3 does not lend itself to extensive interpretation has been recognized. At the hearings on the Charter before the Senate Foreign Relations Committee, Senator Tom Connally, speaking as Chairman, said: <sup>137</sup>

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137. *Hearings* 265. Senator Connally added: "I wanted to make that clear before we got involved in a lot of questions on the subject." The point seems clear enough, but clarity has not helped matters much. The Security Council is nonetheless "involved in a lot of questions on the subject" of voting.

See also the observation of Mr. van Langenhove (Belgium) as President of the Council: "In so far as it sanctions an exception to the voting order, Article 27, paragraph 3, must, where applicable, be interpreted strictly; it cannot be stretched to cover cases which are not



"The construction of this paragraph was that this proviso [*i.e.* the second part of paragraph 3] is an exception to the general rule, and where a party to the dispute is a member of the Security Council, that there are then only four permanent members of the Security Council, excluding the party to the dispute, that vote; in that case the votes of any other three nonpermanent members can be counted to make up the number of seven. In all other cases, however, the votes of five permanent members are required."

Thus any attempt at a broadening interpretation of the voting order in the Security Council appears contrary to the unambiguous terms of Article 27, paragraph 3, and unjustifiable in view of its history. It finds a certain explanation, however, in the penchant of members of the Council to regard as adopted any substantive resolution which has received seven affirmative votes and has not been "vetoed" by any of the permanent members. This overlooks the patent fact that Article 27, paragraph 3, does not require a "veto" in order to defeat a non-procedural action but, on the contrary, requires the affirmative and concurring votes of all permanent members in order to adopt such an action. For this reason the formula which generally is used in the Official Records in reporting the acceptance of resolutions on non-procedural matters is incorrect. In laying down the voting rule "on all other matters," Article 27, paragraph 3, makes a clear distinction between the votes of permanent and the votes of non-permanent members. This distinction should not be overlooked in announcing and reporting the result of a vote. By merely noting that a resolution was adopted by seven or more votes in favor, "one member of the Council being absent," the Official Records do not distinguish between permanent members and non-permanent members. This is contrary to the explicit requirement of Article 27, paragraph 3, whenever votes "on all other matters" are involved. In so doing the Official Records to some extent help to maintain the current fiction.

Some members of the Security Council seem to justify the action in the Korean crisis on the ground that by absenting itself from the Council the Soviet Union violated obligations derived from Article 24, paragraph 1, or Article 28, paragraph 1.<sup>138</sup> This contention may or may not be well-founded. It must be noted, however, that while it has been advanced on different occasions by individual members of the Council, it has never been adopted by the Council as an organ of the United Nations. Even if it is assumed, for the sake of argument, that the Soviet Union by absenting itself from the Council violated obligations contained in or derived from those articles of the Charter, it would still appear doubtful whether the conclusion is well-founded that

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mentioned in Chapter VI of the Charter." Security Council, *Official Records* (2d year), No. 21, p. 426.

138. See page 239 *supra*.

the Security Council is in the position to consider as valid resolutions of a substantive character which do not conform to the mandatory requirement of Article 27, paragraph 3. Whatever be the merits of the international law version of the "clean hands" doctrine (*inadimplenti non est adimplendum*) in case of a bilateral treaty, its application to the interpretation of the Charter of the United Nations would lead to the extremely curious results pointed out above.

International case law points up the difference when multilateral rather than bilateral agreement is involved. For example, the Advisory Opinion of the International Court of Justice of July 18, 1950 on the Interpretation of Peace Treaties (second phase) is pertinent. Speaking of the power of the Secretary-General of the United Nations to appoint a third member of the Commission for the settlement of disputes in accordance with Article 36 of the Treaty of Peace with Bulgaria, and corresponding provisions in the Treaties of Peace with Hungary and Romania, the Court <sup>139</sup> made it clear that one party's failure to fulfill its obligations did not mean that the intent of the multilateral agreement could be by-passed:

"As the Court has declared in its Opinion of March 30th, 1950, the Governments of Bulgaria, Hungary and Romania are under an obligation to appoint their representatives to the Treaty Commissions, and it is clear that refusal to fulfil a treaty obligation involves international responsibility. Nevertheless, such a refusal cannot alter the conditions contemplated in the Treaties for the exercise by the Secretary-General of his power of appointment. These conditions are not present in this case, and their absence is not made good by the fact that it is due to the breach of a treaty obligation. The failure of machinery for settling disputes by reason of the practical impossibility of creating the Commission provided for in the Treaties is one thing; international responsibility is another. The breach of a treaty obligation cannot be remedied by creating a Commission which is not the kind of Commission contemplated by the Treaties. It is the duty of the Court to interpret the Treaties, not to revise them."

The Court went on to discard as irrelevant another maxim (*ut res magis valeat quam pereat*), which might be used to bolster the argument for the recent Security Council action. The Court declared that this maxim <sup>140</sup>

"often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which, as stated above, would be contrary to their letter and spirit."

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139. I.C.J. REPORTS 221-28 (1950).

140. *Id.* at 229.

Finally, the Court did not feel justified "in exceeding its judicial function on the pretext of remedying a default for the occurrence of which the Treaties have made no provision."

It is clear from the opinion of the International Court of Justice that neither the alleged violation of the Charter by the Soviet Union nor the rule of effectiveness sometimes evoked in the Security Council can justify an interpretation of Article 27, paragraph 3, which is contrary to its letter and spirit. This article, as generally understood, embodies the principle of unanimity of the permanent members of the Security Council. Whether the permanent members were wise in making it the sheet anchor of the Security Council is not the issue here. The error, if there was one, consisted, in the first place, in assuming that unanimity among the great powers would be forthcoming on major political issues in the post-war world, rather than in accepting the fact that without this unanimity the organization could not function as an effective organ for the maintenance of international peace and security. In the second place, it was an error of the first magnitude to overlook the necessity of providing for the contingency that unanimity might not be forthcoming in cases in which, politically, inaction of the Council would not be acceptable. As the opinion of the International Court of Justice shows, this is not the only case in which necessary precautions, political or juridical, have been omitted. The opinion of the Court also shows that such defects cannot easily be glossed over by strained interpretation.

The seriousness of these shortcomings in the Charter were early realized, but left uncorrected. At the drafting stage at the San Francisco Conference a number of governments expressed their misgivings at the obvious faults of the Yalta voting formula. For example, the Canadian delegation specifically proposed in Committee III/1 to amend the Yalta voting formula in such a manner that on substantive matters "an affirmative vote of at least two-thirds of the members present and voting, including the concurring votes of the permanent members present and voting" would be required and sufficient. In explaining this proposal the Canadian delegate declared that <sup>141</sup>

"since the Yalta voting formula required an affirmative vote of seven out of eleven members of the Council, absence or abstention would be equivalent to a negative vote and the chances of a deadlock would thus be greatly increased."

The Canadian delegate concluded by saying that "if such a change were not made now . . . practical reasons would soon lead to a demand for the amendment of the Charter in this respect." In the ensuing discussion the delegate of New Zealand suggested that "the word 'con-

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141. Document 1105/III/1/48(2). UNCIO Documents, vol. XI, p. 534.

curring' in paragraph 3 had to be looked into in order to determine what would happen when a permanent member was absent." And the Australian delegate "believed that 'concurring' meant that each permanent member must be present and must vote." The delegate of the Soviet Union, however, "thought that the introduction of the Canadian proposal at this meeting would lead to difficulties," and the Canadian delegate "withdrew his amendment but urged that the sponsoring governments take the matter under consideration."<sup>142</sup> This apparently has not been done and the consequences are now upon us.

France also noted the possibility of long deadlock in the Security Council, and also made an abortive attempt to provide against it. The French proposal was in essence this:<sup>143</sup>

"Should the Council not succeed in reaching a decision, the members of the Organization reserve to themselves the right to act as they may consider necessary and in the interest of peace, right and justice."

But France also was forced to withdraw her proposal. What she had in mind was clearly inspired by the experience of the League of Nations, and more particularly Article 15, paragraph 7 of the Covenant. However, no reference to the experience of the League, explicit or implicit, could prevail over the stubborn determination of the Four Sponsoring Governments, in which France finally concurred, to have the Yalta voting formula in the Charter or to have no Charter at all. Characteristic of this is the following statement of the United States delegate in Committee III/1 at the June 12, 1945, meeting:<sup>144</sup> The US Delegate

"requested the delegates to cast their votes in favor of the present voting provisions and to do so in the knowledge that they were creating one of the greatest documents drawn by the hand of man. He was aware of the discouragement which had been voiced by certain delegates, but this was not the first time in history that cynicism had presided at the birth of great events. He hoped that certain statesmen here would prove to be as wrong as those who had voiced doubts and apprehensions at the time of the framing of the United States Constitution."

The powers were warned of the consequences. Those who so grandiloquently proclaimed the virtues of the Charter and who urged upon a sceptical conference the acceptance of the Yalta voting formula, now invoke the unworkability of that formula as an excuse for departing from it by less than five-power agreement. In thus availing themselves

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142. *Id.* at 516.

143. Document 1102/III/1/62. UNCIO Documents, vol. XI, p. 696.

144. Document 956/III/1/47. UNCIO Documents, vol. XI, p. 490.

of the obvious shortcomings of the voting rule laid down by themselves for the Security Council, they are bound to admit the general weakness of the conception upon which they based the main pillar and guardian of the post-war security system. Many of the other governments participating in the San Francisco Conference share the responsibility. For the "veto fixation" which got hold of so many delegates and which resulted in incessant attacks on the great power "veto," resulted merely in making "the definition and use of the veto more rigid and restrictive than it might otherwise have been. Article 27 was stiffened and toughened by the blasts of small-power eloquence."<sup>145</sup> This may account in part for the omission of exploring fully the implications of the Yalta voting formula on the Council's functions for preserving peace and security.

The second main defense of present Security Council practice—the attempted analogy between absence and abstention—is also untenable, because it fails to do justice to the notion or meaning of abstention which, as developed elsewhere in this paper, is a manifestation of consent in disguise. Abstention is not, of course, consent in disguise or otherwise to the resolution in question; rather it is consent to the action which is to result from the resolution. Such a manifestation, disguised or implied, cannot be said to exist if the permanent member in question, in official statements and communications, has made the imputation of such consent impossible. Mr. Malik, before leaving the Security Council on January 13, 1950, announced on behalf of the Soviet Union that it would "not recognize as legal any decision of the Security Council adopted with the participation of the representative of the Kuomintang group, and will not be guided by any such decision." It is true that he did not specifically say then that the Soviet Union would not recognize as legal and would not be guided by decisions adopted in its absence. But if this omission is significant, it was remedied in subsequent written communications and in statements before the Security Council at the meetings held since August 1, 1950.

Another point should be made here. The General Assembly Resolution 267 (III) of April 14, 1949, accepted by all the five permanent members of the Security Council, provided for consultation among the permanent members before voting.<sup>146</sup> There is no evidence available to the public as to whether such consultations took place before the June 25 or the June 27, 1950, resolutions. If they had taken place, it would have been possible perhaps to ascertain what the view of the Soviet Union was regarding the consequences of its own absence and its attitude to the proposed resolutions. Its argument concerning the presence of the "Kuomintang group" representative might well have

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145. HASLUCK, *op. cit.* *supra* note 5, at 131.

146. Security Council, *Official Records* (4th year), no. 48, pp. 1, 2.

been disregarded, as that question had been disposed of in the only manner in which the Security Council could resolve such matters. It would not have been possible to dispose with equal ease of the point of view of the Soviet Union about the consequences which it attached to its own absence.

It is of course true that strict application of Article 27, paragraph 3, may result in deadlock or "paralysis" of the Security Council. But this is what was intended. The great powers meant by their adoption of the Yalta voting rule that the Security Council should take no action unless each of the big five agreed to it. The Council was infected from birth with the virus of paralysis. Under the Yalta rule, the Council can act if its five main limbs and at least two others move in the same direction, otherwise it cannot act at all. This was foreseen at the San Francisco Conference. It was precisely for this reason that extended powers were then conferred upon the General Assembly of the United Nations—powers which went well beyond anything contemplated at Dumbarton Oaks. This being so, what difference can or does it make whether the paralysis of the Security Council is the result of an obstructionist veto or of an equally obstructionist absence? The Charter is not at all concerned with the "veto." The Charter does require the concurring vote of the five permanent members, and is not concerned with the manner or circumstances which prevent the fulfilment of this requirement. It might have been drafted otherwise. As the Canadian and French proposals referred to above indicate, different and in many ways sounder solutions to the voting problem in the Security Council were before the San Francisco Conference. The great powers, however, were unwilling to change the Yalta voting formula in any way. That formula represented not the minimum but the maximum of agreement that could be reached by them then as well as now.

The Security Council is not identical with the United Nations, and a "paralysis" of the former need not extend to the General Assembly and its clearly stated powers to direct the activities of the United Nations even in matters affecting international peace and security.<sup>147</sup> Legally and politically, action by the General Assembly could have produced in the Korean crisis substantially the same results as those achieved by means of Security Council resolutions without being open to the criticism to which the latter is exposed. At the 476th meeting of the Security Council, Sir Gladwyn Jebb suggested that the resolutions adopted by the Council since June 25 were in the nature of recommendations pursuant to Article 39 of the Charter. They were therefore legally not binding even if they were in conformity with Article 27, paragraph 3, and their execution depended upon the will of the individual members of the United Nations. Similar results would have

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147. Cf. Kelsen, *op. cit. supra* note 3, at 266.

been achieved by resolutions of the General Assembly. Having declared the impossibility of the Security Council to function owing to the absence of one of the permanent members, the Assembly could have called upon the member governments to lend assistance to the Republic of Korea, etc.

With reference to Article 2, paragraph 5, the results of such General Assembly action would have been substantially the same as if there had been a Security Council resolution. The positive obligation (to "give to the United Nations every assistance in any action it takes in accordance with the present Charter") would come into play in the case of action taken by the General Assembly as well as in the case of action taken by the Security Council. On the other hand, the negative obligation (to "refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action") would not arise in either case. In the first place, the authorities of Northern Korea have not been regarded as a "state" by the Security Council and probably would not have been so regarded by the General Assembly; and secondly the action contemplated in the Security Council resolutions cannot be regarded, any more than would be resolutions of the General Assembly, as "preventive or enforcement action,"—terminology generally taken to refer only to action pursuant to Articles 41 and 42, not to resolutions based on Article 39.

Moreover, it is at least arguable, though perhaps doubtful, that members of the United Nations were in the position to carry out the measures envisaged in the Council resolutions under reference even if it were admitted that formally they did not conform to the mandatory requirement of Article 27, paragraph 3. They may not have felt bound to carry them out any more than they would if the Council had taken a formally valid recommendation; they may none the less have felt it desirable or even imperative to carry them out. Such was the case in the Syria-Lebanese question before the Security Council in 1946. A draft resolution on this question was put to the vote at the 23rd meeting, February 16, 1946, and "vetoed" by the Soviet representative. Mr. Bidault (France) then said:

"from a legal standpoint, this vote does not create an obligation.

"However, I should like to add in the name of France that, having signified my agreement to the text submitted to us, without, however, taking part in the voting, I shall not now withdraw my consent on purely formal grounds, and I shall stand by my decision."

Similarly, Mr. Bevin (United Kingdom) declared: <sup>148</sup>

"We will, as a party to this conflict, carry out the majority decision of the Council as expressed in the vote."

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148. Security Council, *Official Records* (1st year), First Series, no. 1, p. 368.

In like manner, the 53 members of the United Nations who are said to support in one way or another the measures recommended in the Korean affair might have been equally active in their support without contending that the June 25 and 27 resolutions were adopted by the Council in conformity with Article 27, paragraph 3, since in any event, as Sir Gladwyn Jebb suggested at the 476th meeting, the function of the Security Council in the Korean affair is not an operating one.<sup>149</sup>

It is characteristic of the extent to which members of the Security Council as well as others have become victims of the "veto complex" that nearly all the arguments in favor of the "absence equals abstention" thesis revolve around an interpretation of Article 27, paragraph 3, which finds almost no support in its text or history. The principle expressed therein is that of unanimity of the five permanent members, and not that of the veto. The paragraph does not say that a substantive resolution is lost or rejected when one permanent member votes against it, which is the notion underlying the "veto" approach. It does say, on the contrary, that decisions on all matters other than of procedure shall "be made by an affirmative vote of seven members including the concurring votes of the permanent members." It is consequently the duty of the President of the Security Council to declare the result of a vote in those terms. That is the expression of the principle of unanimity and of the traditional principle of consent in international law as applied to voting in international organizations. This principle is satisfied, of course, by an affirmative and concurring vote—that is by express consent to the proposed Security Council action. It is also satisfied by abstention—that is by tacit consent to the Council action. It is not satisfied when there is neither express nor tacit consent to the proposed Council action. The precedents of abstention are many and supported, as they must be, by all of the permanent members of the Security Council and encouraged by the General Assembly itself. The same cannot be said of absences.<sup>150</sup>

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149. At least one of the 53 member governments appears to have taken this view of the Security Council resolutions. Mr. Osten Unden, Minister of Foreign Affairs of the Government of Sweden, in his cablegram of July 3, 1950, to the Secretary-General, said: "By the resolution of June 25th the members of the Security Council who voted for the resolution called upon all members of the United Nations to refrain from giving assistance to the North Korean Authorities"; and again "as far as the Resolution of June 27th is concerned the members of the Security Council who have voted for it have recommended. . . ." Document S/1564. This indicates that the Swedish Government at least considers the resolutions and recommendations contained therein as resolutions accepted by those members of the Security Council who voted "in favor" rather than as resolutions formally adopted as such by the Security Council.

150. At the second part of the First Session of the General Assembly, Mr. Noel Baker (United Kingdom) expressed in the First Committee the hope that "it could be agreed that, as a customary practice, neither absence nor abstention should count as a veto." Official Records of the Second Part of the First Session of the General Assembly, First Committee, p. 115. See also *Suggestions regarding voting in the Security Council laid before the permanent*



Whether the recent conduct of the Security Council in the Korean affair in particular has created or will create precedents accepted by all of the permanent members of the Council remains at this writing in the realm of doubt. The legal effect of absence is, after all, a question of the interpretation of the Charter, even though in this respect the Charter, like many other international instruments, is expressive of a political agreement. This agreement was formalized at the Yalta Conference, in the Statement of the Four Sponsoring Governments in which France concurred, and finally in the Charter itself. While the validity and binding force of the Statement, or certain parts of it, have been the subject of different interpretations on different occasions in the Security Council and elsewhere, it still remains an important piece of evidence regarding the meaning attached to the principle of unanimity by the five permanent members of the Security Council and expressed in Article 27, paragraph 3, of the Charter. In spite of its political and ideological overtones, the controversy regarding the legal effect of the absence of a permanent member from the Security Council reduces itself thus to a question of the proper interpretation of one of the fundamental clauses in the Charter; like other such questions which have arisen in the past, this one is believed to be susceptible of objective and judicial determination.

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*members by the United Kingdom Secretary for Foreign Affairs on 15 November 1946, Document A/C.1/95, id. at 327. Suggestion 7 reads: "It would be of great advantage if it were possible to provide, by some means, that a permanent member could abstain from voting without automatically vetoing the proposal. Similarly, that mere absence of a permanent member should not have the effect of a veto." This official British proposal made as it was after the Iranian incident involving the first "walk-out" of the Soviet Union, came to naught. This is no doubt significant as is Mr. Noel Baker's reference to "customary practice" growing out of agreement. Obviously, the Iranian incident created no such "customary practice" which would have a bearing for the future. And no "customary practice" in this matter can grow out of disagreement between the five permanent members of the Security Council. Agreement there is regarding abstention; there is none regarding absence.*